CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

vs.

THE UNITED STATES.

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED NOVEMBER 16, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

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THE UNITED STATES.

ON CERTIFICATE FROM THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42676

JOHN M. PERRY

v.

THE UNITED STATES

Statement of Facts and Certificate

Messrs. Larkin, Rathbone & Perry appeared for the plaintiff.

Messrs. George C. Sweeney, William W. Scott, and Harry LeRoy Jones appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley

STATEMENT OF FACTS

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following facts, stated in plaintiff's petition filed June 22, 1934:

1. That ever since January 1, 1933, and for a number of years prior thereto, petitioner has been the owner and registered holder of an obligation of the United States of America, in principal amount of $10,000, known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number 19831 (a copy of which is annexed in Schedule A), which is one of a series of four and one-quarter per cent, gold bonds of 1933-1938 authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918 (a copy of the relevant provisions of [fol. 2] which is annexed in Schedule B), wherein and whereby the defendant, as authorized by said Act and amendments thereto, promised to pay to your petitioner, or his registered assigns, on October 15, 1938, or at any time after October 15, 1933, at the pleasure of the defend-

ant, said principal sum in United States gold coin of the standard of value on the date of issuance, and to pay interest in like gold coin on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920, on April 15 and October 15 in each year, until the principal thereof should be payable.

2. That under and pursuant to the Laws of the United States, namely, an Act approved March 14, 1900, (31 Stat. 45,) which was in force on September 24, 1917, at the time of the issuance of said bond, and at the time of the acquisition of the same by your petitioner, a dollar in gold consisted of 25.8 grains of gold .9 fine.

3. That by virtue of the agreement between your petitioner, as the owner and registered holder of said bond, and the defendant, pursuant to whose authority said bond had been issued, and said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, your petitioner was entitled to receive from the defendant at the time of the maturity of said bond, whether by redemption or otherwise, 10,000 gold dollars each containing 25.8 grains of gold .9 fine.

4. That on October 12, 1933, the defendant, through and by the Secretary of the Treasury, in Treasury Department Circular No. 501, dated October 12, 1933, (a copy of the relevant provisions of which is annexed in Schedule C,) and pursuant to said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, called for redemption on April 15, 1934, a part of said [fol. 3] issue of Fourth Liberty Loan 4½% Gold bonds of 1933-1938, namely, among others, all outstanding registered bonds bearing serial numbers the final digit of which was 1.

5. That the final digit of the Serial Number of said bond of which your petitioner is the owner and registered holder is 1, the Serial Number being 19831, and said bond is one of those called for redemption on April 15, 1934, as aforesaid.

6. That after April 15, 1934, and on May 24, 1934, your petitioner duly presented said bond to the defendant at the Division of Loans and Currency, Treasury Department, Washington, D. C., in accordance with said Act of Septem-

ber 24, 1917, as amended, said Treasury Department Circular No. 121, and said Treasury Department Circular No. 501, and demanded of said defendant that it redeem said bond by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine.

7. That said bond when presented was properly assigned to "The Secretary of Treasury for redemption", as provided in said Treasury Department Circular No. 501.

8. That the defendant refused to comply with your petitioner's demand and refused to redeem said bond in the manner specified therein and as prescribed by the Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121.

9. That your petitioner then demanded of said defendant 258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing 15-5/21 grains of gold .9 fine, or 16,931.25 dollars in legal tender currency.

[fol. 4] 10. That the defendant refused to accede to your petitioner's demands, or any one of them, and refused to redeem said bond except by the payment of 10,000 dollars in legal tender currency.

11. That the payment of 10,000 dollars in legal tender currency is not adequate and complete performance of the defendant's obligation.

12. That defendant's said refusals were, as your petitioner is informed and verily believes, on the ground that the Joint Resolution of June 5, 1933, (48 Stat. 113), excused full performance of defendant's obligation.

13. That the Congress of the United States had no power to enact said Joint Resolution.

14. That the operation and effect of said Joint Resolution is to deprive your petitioner of his property without due process of law.

15. That said Joint Resolution is, therefore, unconstitutional and void.

16. That said Joint Resolution was repealed by the Gold Reserve Act of 1934, approved January 30, 1934.

17. That by reason of the circumstances aforesaid, your petitioner was damaged in the sum of $16,931.25, the value of defendant's obligation to petitioner, which sum is now due and owing by the United States to your petitioner, and no part of which has been paid.

18. That your petitioner is the sole owner of the claim herein made and the only person interested therein, and that there has been no assignment or transfer of this claim [fol. 5] or any interest therein, and your petitioner is justly entitled to recover the amount herein claimed from the Government of the United States after allowing all just credits and offsets.

19. That no action upon your petitioner's claim has been had by or before Congress or, except as aforesaid, any Executive Department of the Government.

20. That your petitioner is and at all times herein mentioned was a citizen of the United States; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

21. That the address of your petitioner is No. 70 Broadway, in the Borough of Manhattan, City, County and State of New York; that the address of the attorneys for your petitioner, Larkin, Rathbone & Perry, Esqs., is No. 70 Broadway, Borough of Manhattan, City, County and State of New York.

22. That the facts stated in this petition are true.

Wherefore, your petitioner asks that judgment may be entered in his favor against the United States for the sum of $16,931.25, with any interest due thereon.

To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the defendant.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the court finds it necessary for a proper disposition of the case that certain questions of law should be determined. They are as follows:

[fol. 6] QUESTIONS CERTIFIED

1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value," entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above questions and certify and transmit and refer the same to the Court of Claims of the United States for its guidance in the further progress of the case.

Fenton W. Booth, Chief Justice. Wm. R. Green, [fol. 7] Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard J. Whaley, Judge.

[fol. 8] I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of John M. Perry v. The United States, No. 42676, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 15th day of November, A. D. 1934.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal Court of Claims.)

[fol. 9] [Endorsed:] Court of Claims. No. 42676. John M. Perry v. The United States. Questions to be certified to the Supreme Court.

Endorsed on Cover: File No. 39,160. Court of Claims. Term No. 532. John M. Perry vs. The United States. Certificate. Filed November 16, 1934. File No. 532, O. T., 1934.

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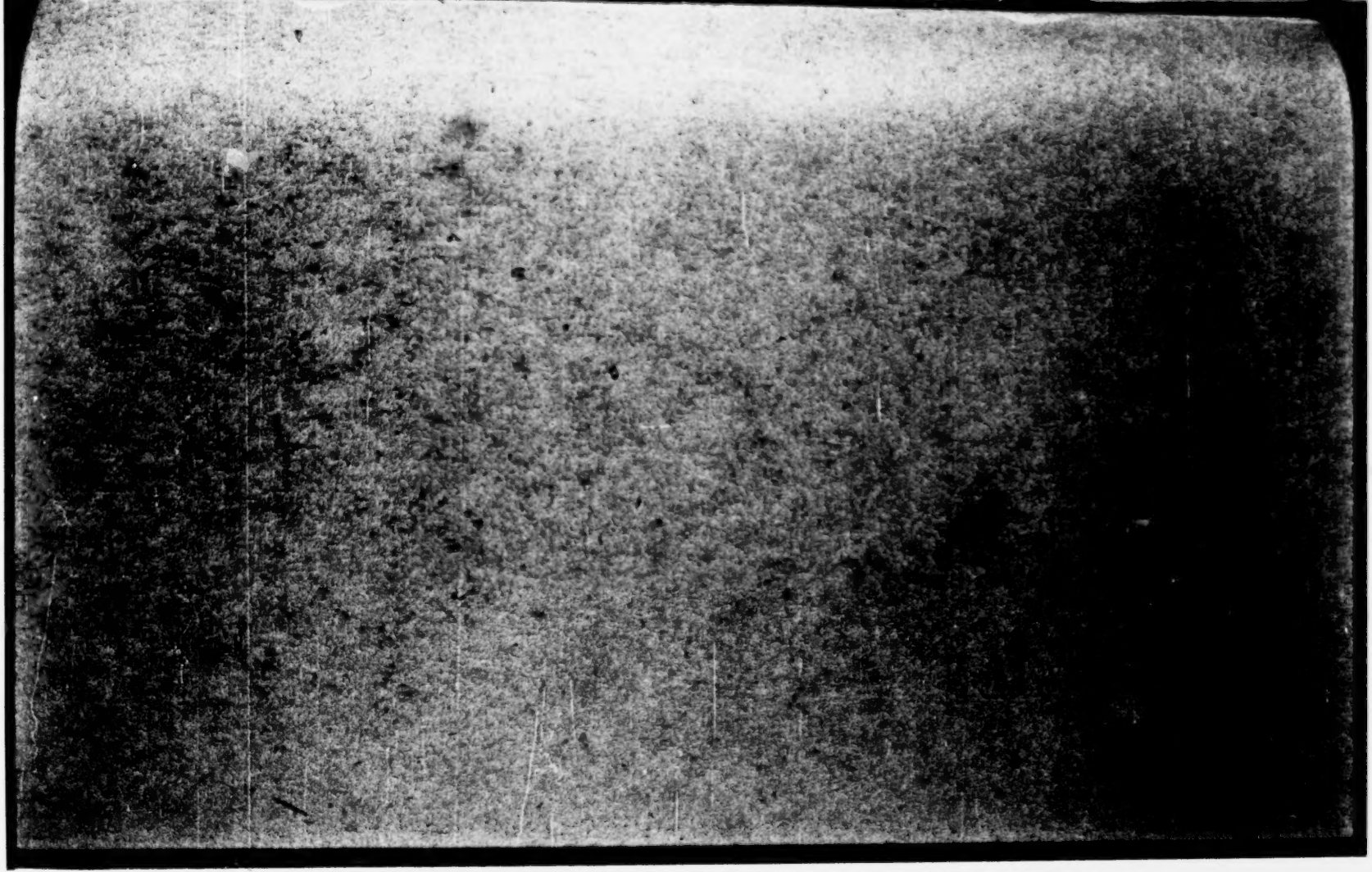

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DEC 20

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF OF CLAIMANT

JOHN M. PERRY,
Claimant.

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET,
Of Counsel.

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Argument:

I The claimant as the owner and holder of a Fourth Liberty Loan 4¼% Bond Issued in 1918 "payable in United States Gold Coin of the present standard of value" is entitled to receive from the United States an amount in legal tender currency in excess of the face amount of said Bond 10

ONE: The proper construction of the provision in claimant's bond to the effect that principal and interest thereof are payable in United States gold coin of the standard of value of the date of issuance, is not that it prescribes the method of payment, but that it is a measure of the obligation of the United States..... 10

Prior to the enactment of the Joint Resolution of June 5, 1933, and on April 15, 1934, (the date of redemption of claimant's bond) if said statute is unconstitutional and void, the claimant, according to the terms of his bond, was entitled to recover from the United States an

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amount in legal tender currency equivalent to the value of 10,000 gold dollars each containing 25.8 grains of gold .9 fine, or equivalent to the value of 258,000 grains of gold .9 fine..... 16

Two: The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in claimant's bond is unconstitutional and void for the following reasons:

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C. It violates the Fifth Amendment to the Constitution in that it deprives the claimant of his property without due process of law 31

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

The Court of Claims of the United States, by an order dated November 15, 1934, certified to this Court certain facts and two questions of law concerning which it desired the instruction of this Court for their proper decision. The facts certified in effect constituted the entire petition of the claimant together with the additional statement that the defendant had filed a demurrer on the ground that the petition did not state a cause of action against the defendant, thereby admitting the truth of the facts stated in the petition. The certificate is set out in full in the Appendix, page i; the facts stated therein are briefly as follows:

The claimant is, and has been for a number of years, the owner and registered holder of an obligation of the United States of America, in the principal amount of $10,000., issued in 1918 and known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number 19831, wherein and whereby the defendant promised to pay to the claimant, or his registered assigns, on October 15, 1938,

or at any time after October 15, 1933, at the pleasure of the defendant, said principal sum "in United States gold coin of the present standard of value", and to pay interest in like gold coin on said principal sum at the rate of 4¼% per annum, from April 15, 1920, on April 15 and October 15 in each year, until the principal thereof should be payable.[1]

At the time of the issuance of said bond, and at the time of the acquisition of the same by the claimant a dollar in gold consisted of 25.8 grains of gold .9 fine.[2] The claimant was, therefore, entitled to receive from defendant at the time of the maturity of said bond, whether by redemption or otherwise, 10,000 gold dollars, each containing 25.8 grains of gold .9 fine, or its equivalent in legal tender currency as hereinafter set forth.

On October 12, 1933, the defendant, through and by the Secretary of the Treasury, called for redemption on April 15, 1934, a part of said issue of Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 including, among others, said bond of which the claimant is the owner and registered holder.[3] After said date, and on May 24, 1934, the claimant duly presented said bond to the defendant at the Division of Loans and Currency, Treasury Department, Washington D. C., and demanded of the defendant that it redeem said bond by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine.[4] The defendant refused to comply with the claimant's demand and refused to re-

1. This bond is one of the series of 4¼% Gold Bonds of 1933-1938 authorized by an Act of Congress, approved September 24, 1917, as amended, (40 Stat. 288) and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918. The relevant provisions of this bond, of the Act of September 24, 1917, as amended, and of Treasury Department Circular No. 121, are set forth in the Appendix hereto, page vi et seq.

2. Act of Congress approved March 14, 1900, 31 Stat. 45.

3. Treasury Department Circular, No. 501, dated October 12, 1933, Appendix page x, promulgated in accordance with the Act of September 24, 1917, (40 Stat. 292) as amended, and Treasury Department Circular No. 121.

4. In accordance with said Act of September 24, 1917, as amended, and said Treasury Department Circulars Nos. 121 and 501, said bond at the time of presentment, was properly assigned to "The Secretary of Treasury for redemption."

deem said bond in the manner specified therein. The claimant then demanded of the defendant 258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing $15\frac{5}{21}$ grains of gold .9 fine, or 16,931.25 dollars in legal tender currency.[5] The defendant refused to accede to the claimant's demands, or any of them, and refused to redeem said bond except by the payment of $10,000. in legal tender currency. The claimant declined to accept the payment of $10,000. in legal tender currency believing that it was not an adequate and complete performance of the defendant's obligation.

On June 22, 1934, claimant filed his petition with the Clerk of the Court of Claims of the United States alleging the aforesaid facts and requesting that judgment be entered in his favor against the United States for the sum of $16,931.25, with any interest due thereon. The defendant filed a demurrer to claimant's petition with the Clerk of the Court of Claims, on October 30, 1934, which alleged: that the petition did not set forth a cause of action against the United States, and that it did not set forth a cause of action against the United States within the jurisdiction of the Court of Claims.

The questions arising out of these facts and which were certified by the Court of Claims to this Court are as follows:

1. Is the claimant, being the holder and owner of a Fourth Liberty Loan $4\frac{1}{4}\%$ bond of the United States, of the principal amount of $10,000., issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value," entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

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5. By Presidential Proclamation on January 31, 1934, made pursuant to the Emergency Relief Act of May 12, 1933, as amended, 48 Stat. 31, the weight of the gold dollar was reduced to $15\frac{5}{21}$ grains of gold .9 fine, or slightly more than 59% of its former weight of 25.8 grains of gold .9 fine.

2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?

The first of these questions, in sweeping terms, is plainly directed at the right of the petitioner to recover from the United States and comprehends any cause of action petitioner may have. The second question is somewhat ambiguous, but, in view of the broad scope of the first, will be considered as dealing with the question of the jurisdiction of the Court of Claims. The claimant contends that both of these questions should be answered in the affirmative.

It is well settled that the United States is bound by its contracts as are private persons,[6] and there can be no doubt, were it not for certain statutes enacted by the Seventy-third Congress, that the claimant would be entitled to payment by the defendant in accordance with the terms of his contract and to recover damages upon defendant's failure to so perform.[7] In substance one of these statutes specifically purports to release the defendant from strictly complying with the terms of its obligation by permitting it to satisfy its debt by paying less than the sum contracted for.[8] The sole issue presented by the first question is, therefore, whether Congress may by statute repudiate in part an obligation entered into under the authority of a power delegated to it by the Constitution of the United States of America.

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6. The most recent expression of this doctrine is found in *Lynch* v. *United States*, 292 U. S. 571.
7. See Point One, *infra* at page 10.
8. Public Resolution No. 10, 73rd Congress, June 5, 1933, 48 Stat. 113.

Public Resolution No. 10, Seventy-third Congress.

In order to understand the full effect of the Joint Resolution of June 5, 1933 (Public Resolution No. 10, Seventy-third Congress), a short review of the circumstances surrounding its enactment is necessary. Prior to the legislation of March, 1933, the currency system of the United States had been based primarily on a "gold standard", that is to say, the value of the dollar was maintained at home and abroad at par with the value of a certain amount of gold.[9] As a result of presidential proclamations and orders placing an embargo on gold, both coin and bullion, and making it unlawful to possess it, the United States ceased to be "on a gold standard".[10] It is to be noted that none of these statutes, proclamations, or orders purported to make "gold clause" contracts illegal and such provisions would have been enforced according to their full intent and meaning. On June 5, 1933, the date of the enactment of Public Resolution No. 10, for all practical purposes, there was but one kind of currency lawfully in

9. "Our present unit of weight is a fixed weight, the pound; our unit of length is a fixed length, the foot, and our unit of content is a fixed content, the quart. But for our unit of value, under the gold standard we used not a fixed value, but whatever value happened to attach at the time to a fixed weight of gold, namely, to 23.22 grains of pure gold, which was the gold content of the dollar. In the Spring of 1933 the United States went on a paper money standard". Kemmerer, MONEY, 1934 ed., p. 14.

10. Act of October 6, 1917 (Trading With The Enemy Act), 40 Stat. 411, Presidential Proclamation of March 6, 1933; Act of March 9, 1933, (Emergency Banking Act) 48 Stat. 2; Presidential Proclamation of March 9, 1933; Executive Order of April 5, 1933, Executive Order of April 20, 1933, Regulations of Secretary of Treasury, entitled "Regulations Relating to Licensing the Purchase and Export of Gold," April 29, 1933; Act of May 12, 1933, Title III (Thomas Amendment to the Agricultural Adjustment Act) 48 Stat. 31. The latter statute clothed the President with authority, by proclamation, to reduce the weight of the gold dollar to not less than 50% of its former weight. This power had not been exercised by June 5, 1933, and was not, in fact, used until January 31, 1934, after the enactment of the Act of January 30, 1934 (Gold Reserve Act), 48 Stat. 337, which in effect placed the United States on a gold bullion standard and amended the Act of May 12, 1933, so as to authorize the President to fix the weight of the gold dollar at not more than 60% of its former weight. Pursuant thereto the President by proclamation dated January 31, 1934, reduced the weight of the gold dollar to 15 5/21 grains of gold .9 fine.

circulation (with the exception of token money), namely paper dollars, and at that time, although the dollar was legally stabilized at 25.8 grains of gold .9 fine, there was a disparity between the actual value of the paper dollar and that of the gold dollar.[11]

Under these circumstances the Joint Resolution of June 5, 1933, was adopted. The first paragraph of the Act reads as follows:

> "'*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.
>
> '(b) As used in this resolution, the term "obligation" means an obligation (including every obliga-

11. See index of wholesale commodity prices on a gold basis, published in The Annalist Weekly of December 14, 1934, at page 817, and reproduced by permission in Appendix p. xiv.
This situation is not entirely unprecedented in this country. Shortly after the Civil War there was a disparity in the value of paper money made legal tender by the Legal Tender Acts, and in the value of gold coin and bullion. If it is to be considered that the President exceeded his power in promulgating the Executive Order of April 5, 1933, ordering all persons to surrender gold coin, gold bullion, and gold certificates, and for this reason gold, in coin and bullion, was legally available, the situation is practically identical. (See *United States* v. *Campbell,* 5 Fed. Supp. 156; 47 Harv. L. Rev. 479 (1934).)

> tion of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.' "

This statute seems susceptible of only one interpretation. It purports to make ineffectual provisions in contracts, public or private, requiring the payment of gold or a particular kind of coin or currency, or the payment of an amount of other currency measured by the value of gold or a particular kind of coin or currency. Under this Joint Resolution, had the claimant's bond been called for redemption at any date after June 5, 1933, regardless of the provision that the principal and interest thereof is "payable in United States gold coin of the present standard of value", it would have been satisfied by the payment of $10,000. in legal tender currency, a sum less than claimant would receive were the redemption made in accordance with the tenor of the bond.[12]

The claimant contends that Congress has no power directly to lessen its obligation by repudiation; that the purported abrogation of the gold clause in the claimant's Liberty Bond was wholly without legal justification or excuse; and that, in this respect, the Joint Resolution of June 5, 1933, is, therefore, unconstitutional and void.

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12. Some question of the measure of claimant's recovery might have been presented had his bond matured before January 31, 1934. However, on that date by Presidential Proclamation promulgated pursuant to the Act of May 12, 1933, 48 Stat. 31, as amended, the gold dollar was stabilized at 15 5/21 grains of gold .9 fine, constituting thereby an official recognition of the depreciated value of the dollar. A gold dollar of 25.8 grains of gold .9 fine was thereafter worth $1.69 in the new 15 5/21 grain dollars.

SUMMARY OF THE ARGUMENT

I

The claimant as the owner and holder of a Fourth Liberty Loan 4¼% Bond Issued in 1918 "payable in United States Gold Coin of the present standard of value" is entitled to receive from the United States an amount in legal tender currency in excess of the face amount of said Bond.

POINT ONE

The proper construction of the provision in claimant's bond to the effect that principal and interest thereof are payable in United States gold coin of the standard of value of the date of issuance, is not that it prescribes the method of payment, but that it is a measure of the obligation of the United States.

Prior to the enactment of the Joint Resolution of June 5, 1933, and on April 15, 1934, (the date of redemption of claimant's bond) if said statute is unconstitutional and void, the claimant, according to the terms of his bond, was entitled to recover from the United States an amount in legal tender currency equivalent to the value of 10,000 gold dollars each containing 25.8 grains of gold .9 fine, or equivalent to the value of 258,000 grains of gold .9 fine.

POINT TWO

The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in claimant's bond, is unconstitutional and void for the following reasons:

A. It is in direct violation of Section four of the Fourteenth Amendment to the Constitution of the United States which is an express limitation upon the powers delegated to Congress by the Constitution.

B. No provision of the Constitution authorizes Congress to enact such legislation.

C. It violates the Fifth Amendment to the Constitution in that it deprives the claimant of his property without due process of law.

POINT THREE

The claimant, in any event, is entitled to recover just compensation for the taking of his property for public use.

II

The Court of Claims has jurisdiction of the claimant's action against the United States.

ARGUMENT

I

POINT ONE

The purpose and effect of the gold clause in the claimant's bond is not to prescribe the method of payment, but to measure the obligation of the United States.

The claimant's bond recites: "The United States of America for value received promises to pay to John M. Perry or registered assigns the sum of Ten Thousand Dollars on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920 on April 15 and October 15 in each year, until the principal hereof shall be payable, ... The principal and interest hereof are payable in United States gold coin of the present standard of value. * * *"

The obligation of this contract is not to pay solely in gold coin or bullion. The language inserted therein by the United States is merely the formal expression of an agreement to protect the bondholder against fluctuations in the medium of payment, and to establish a measure of the debtor's obligation that will carry this intention into effect. The intention of the parties was not, in the words of the Joint Resolution of June 5, 1933, to require payment "in gold or a particular kind of coin or currency", but "in an amount in money of the United States measured thereby".

The Act of March 18, 1869, (16 Stat. 1), reading as follows, was an integral part of the law at the time of the issuance of claimant's Liberty Bond:

> "The faith of the United States is solemnly pledged to the payment in coin or its equivalent * * * of all the interest bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver."

This statute must be considered as entering into and being a part of claimant's Liberty Bond. The gold clause therein, for this reason, must be taken to read: "The principal and interest hereof are payable in United States gold coin of the present standard of value *or its equivalent*". This construction and only this construction confirms the intention of the parties.[13]

The question of the construction of a gold clause contained in an obligation of the Federal Government has never arisen. There are, however, numerous decisions involving similar clauses in private obligations.

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13. A further argument in support of the construction set forth above (and which was stressed by Lord Russell of Killowen in delivering the decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité* [1934], A. C. 161) may be found in the fact that the gold contract contained in the bonds of the Fourth Liberty Loan cannot be satisfied in "gold coin of the United States." Pursuant to Treasury Department Circular No. 121 (Appendix, pp. viii, ix) bonds of the Fourth Liberty Loan were issued in denominations of $50, $100, $500, $1000, $5000 and $10,000, and interest thereon was payable semi-annually on April 15th and October 15th. The amount of interest payable semi-annually on bonds of this issue was, in the case of bonds of the denomination of $50, $100, $500, $1000, $5000 and $10,000, respectively, the sum of $1.06 and $1.07, $2.12 and $2.13, $10.62 and $10.63, $21.25, $106.25 and $212.50. At the time of the issuance of the bond there was no single standard gold coin, or combination of standard gold coins that could have been used in making payments of a semi-annual instalment of interest payable on bonds of the denomination of $50, $100, $500, $1000 or $5,000. The "gold coins of the United States" were then the quarter eagle, or $2.50 piece, the half eagle, or $5. piece, the eagle, or $10. piece, and the double eagle or $20. piece, (26 Stat. 485). [The coinage of the quarter-eagle or $2.50 piece was discontinued in 1930 (46 Stat. 154)]. Consequently, at the time of the enactment of the Joint Resolution of June 5, 1933, none of the semi-annual instalments of interest payable on any of the bonds could have been met in standard gold coins.

The language of one these decisions, handed down by this Court at the time of the Legal Tender Acts of 1862 and 1863, appears to support the view that such clauses require the payment of gold coin or bullion. In *Bronson* v. *Rodes,* 7 Wall. 229, at page 250, the Court said:

> "Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstances, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count."

An examination of subsequent cases in this Court shows, however, that the judgments given in these cases were not for specific performance of an obligation to deliver a commodity, but judgments for the payment of a debt due in a specific form of currency.

In *Trebilcock* v. *Wilson,* 12 Wall. 687, the Court avoided the analogy to commodity or bullion contracts, and said, at page 694:

> "The note of the plaintiff is made payable, as already stated, *in specie.* The use of these terms, *in specie,* does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain. Such contracts are generally made because it is more convenient for the maker to furnish the articles designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles or neglects to do so, the number of dollars specified is the measure of recovery.

> But here the terms, *in specie*, are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States."

The commodity analogy of *Bronson* v. *Rodes* was definitely rejected in *Thompson* v. *Butler*, 95 U. S. 694, where the Court said at page 696:

> "We are aware that in *Bronson* v. *Rodes*, 7 Wall. 229, it was said that a contract to pay in gold or silver coins 'is, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins,' and that 'it is not distinguishable, . . . in principle, from a contract to deliver an equal weight of bullion of equal fineness;' but, notwithstanding this, it is a contract to pay money, and none the less so because it designates for payment one of the two kinds of money which the law has made a legal tender in discharge of money obligations."

That this Court has recognized the primary object of the gold clause is clear from the following language of *Butler* v. *Horwitz*, 7 Wall. 258, 260:

> "*The obvious intent, in contracts for payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment*, warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after judgment, only by tender of coin, while the absence of any express stipulation, as to description, in contracts for payment in money generally, warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money" (Italics supplied).

The real purpose of the gold clause has been succinctly stated by Post and Willard, *The Power of Congress to*

Nullify Gold Clauses, 46 Harvard Law Review, 1225 at page 1238:

> "The gold clause is inserted in contracts for the benefit of the obligor as well as the obligee, in order to make the instrument attractive by assuring the obligee that, in case of currency depreciation, the obligor will take the loss, and not the obligee. The gold creditor, when he makes the contract, has no intention of committing himself entirely to payment in gold coin, thereby putting it in the power of the debtor, in case of a shortage of gold or an embargo, to raise the defense of impossibility of performance.
>
> "In the Case of Brazilian Loans, Publications of the Permanent Court of International Justice, Ser. A, No. 20 (1929), the court said, at page 120: 'The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligation. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.' "

For these reasons, therefore, it would seem clear that the purpose of the gold clause is not to force payment in gold coin, but to measure the obligation of the debtor. This interpretation has been adopted by the English House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité,* (1934) A. C. 161. In that case, Feist, the holder of a bond for £100 containing a clause to pay the principal and interest in gold coin of the United Kingdom "of or equal to the standard of weight and fineness existing on September 1st, 1928" (the date of issue), asked in the alternative for a declaration that he was entitled to the gold coins or their market value. In the Chancery Division, Mr. Justice Farwell held that the obligation could be satisfied by payment in depreciated currency, and his decision was unanimously affirmed by the Court of Appeal. In the House of Lords, however, Lord Russell of Killowen, speaking for the Court, held that the purpose of the gold clause in the bond was not

to prescribe the method of payment of the bond but to measure the obligation and that the contract should be enforced in accordance with the intention of the parties.[14] In the *Bronson* case and in the cases following it the creditor asked for a gold judgment which the debtor was able to satisfy, since gold coins were then one of the media of currency. Under these cases, however, it has been held proper to enter a judgment in currency for the dollar equivalent of the gold. In *Gregory* v. *Morris*, 96 U. S. 619, the Supreme Court held that the holder of a gold obligation was entitled, if he chose, to "an amount which would be the equivalent in currency of the specific amount of coin as bullion." See also, *Dutton* v. *Palairet*, 154 U. S. 563.

The claimant does not question the right of the Government to discharge its obligation by payment in legal tender

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14. The relevant portions of Lord Russell's opinion are as follows:

"In my opinion the purpose can be discerned from Clause 4, in which the reference to gold coin of the United Kingdom is clearly not a reference to the mode of payment but to the measure of the Company's obligation. So too, Condition 6, which again is a clause not directed to mode of payment, but to describing and measuring liability, shows that the words are used as such a measure. In just the same way I think that in Clauses 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as being the mode in which the Company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe Clause 1 not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way; in other words, I would construe the clause as though it ran thus (omitting immaterial words): 'pay * * * in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928.' I would similarly construe Clause 2.

"I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions. Thus, for instance, the half-yearly payments in accordance with the coupons (which are described in Clause 2 as equal) may in fact not be equal. But I prefer this to the only other alternatives, namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear. * * *"

currency, since that was the only form of money lawfully in circulation at and after the redemption date. The only issue here presented is as to the amount of legal tender currency required to satisfy the claimant's bond. It is clear that the gold clause therein was intended to be and must be construed as a measure for determining the amount both of principal and interest due in such currency.

Prior to the enactment of the Joint Resolution of June 5, 1933, and on April 15, 1934, if said act is unconstitutional and void, the claimant was entitled to recover from the United States the gold value of the face amount of his bond.

The power of the United States to insert gold clauses in its obligations as an inducement to purchasers has never been disputed and the legality of gold clauses has never been questioned in the United States by the decision of a court of last resort. The Government surely does not contend that Congress by the Act of September 24, 1917 (40 Stat. 288), exceeded its powers by providing for the insertion of the gold value clause in the claimant's Liberty Bond. In *Bronson* v. *Rodes*, 7 Wall. 229, this Court sustained the enforceability of gold clauses in the following language:

> "Our conclusion, therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful." (p. 250).

This Court has consistently followed the *Bronson* case,[15] and in *Gregory* v. *Morris*, 96 U. S. 619, a judgment in legal tender currency was granted in an amount measured by the gold value of the contract.

It is elementary that the law is not altered by an unconstitutional act since such a statute is a complete nullity.[16] In the event, therefore, that the Joint Resolution of June 5, 1933, is unconstitutional, the claimant is entitled to recover in legal tender currency the gold-value of the face amount of his bond.

POINT TWO

The Joint Resolution of June 5, 1933, is unconstitutional and void.

A

The Joint Resolution of June 5, 1933, is a direct violation of Section four of the Fourteenth Amendment, expressly limiting the delegated powers of Congress, and making the public debt of the United States inviolable at the hands of Congress.

The first sentence of Section four of the Fourteenth Amendment to the Constitution of the United States reads:

> "The validity of the public debt of the United States, authorized by law, including debts incurred

15. *Butler* v. *Horwitz*, 7 Wall. 258; *Dewing* v. *Sears*, 11 Wall. 379; *Trebilcock* v. *Wilson*, 12 Wall. 687; *The Emily Souder*, 17 Wall. 666; *Thompson* v. *Butler*, 95 U. S. 694. See also *The Case of Brazilian Loans*, Publications of the Permanent Court of International Justice, Ser. A, No. 20, p. 216; *The Case of Serbian Loans*, Publications of the Permanent Court of International Justice Ser. E, No. 5, p. 205; *Feist* v. *Société Intercommunale Belge d'Electricité*, (1934) A. C. 161.

16. *Norton* v. *Shelby County*, 118 U. S. 425, where Mr. Justice Field, writing the opinion for a unanimous Court, stated:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

See, also, *Ex parte Siebold*, 100 U. S. 371, 376; *Chicago, Ind., & L. Ry. Co.* v. *Hackett*, 228 U. S. 559, 566.

for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall not be questioned."

Section four was inserted in the Fourteenth Amendment for the express purpose of preventing Congress from attempting to discharge the obligations of the government by payment of their face value in depreciated legal tender currency. A legislative interpretation of this provision was adopted by the first Congress meeting after its ratification in the Act of March 18, 1869 (16 Stat. 1), the first statute enacted by that Congress. By this Act "the faith of the United States is solemnly pledged to the payment in coin or its equivalent * * * of all the interest bearing obligations of the United States, * * *."

It has never been necessary to apply the prohibition of this portion of Section four for the reason that, after the ratification of the Fourteenth Amendment and the passage of the Act of March 18, 1869, and until recently, no attempt had ever been made by Congress to attack the validity of the public debt. The Joint Resolution of June 5, 1933, enacting a complete repudiation by Congress of the gold clause in some 18 billion dollars of existing and outstanding bonds of the United States expressly made payable in gold coin of the then standard of value, or its equivalent, is necessarily unconstitutional and void as a direct violation of this Section four of the Fourteenth Amendment.

The history of the original form of this first sentence of Section four and of its various amendments or attempted amendments and of the statements of its sponsors, shows that it was inserted for the specific purpose of protecting for all time the public debt of the United States intended to be payable in gold coin or its equivalent from being made payable, dollar for dollar, in legal tender currency.[17]

The Fourteenth Amendment, before ratification by the States, was in form of a Joint Resolution. On May 23,

17. The following facts are derived from a scholarly article, *"A Forgotten Section of the Fourteenth Amendment,"* by Phanor J. Eder, of the New York bar, in Cornell Law Quarterly, Dec. 1933, pp. 1-19.

1866, Senator Wade introduced the following amendment to this Joint Resolution (Cong. Globe, May 23, 1866, pp. 2768, 2769):

> "Section 3. The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the union, or for payment of bounties or pensions incident to such war, and provided for by law, shall be inviolable."[18]

The language of this provision clearly contemplates the future as well as the existing debt of the United States. However, Senator Wade's amendment apparently did not reach a vote. The majority of senators for the next five days were in secret caucus settling their differences in regard to the terms of the amendment. (*Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction* (1914) pp. 315, 316). On May 29, 1866, Senator Howard of Michigan introduced the amendments decided on in the caucus (Cong. Globe, May 29, 1866, p. 2869). The record reads:

> "Mr. Howard: The following is to come in as Section 4: 'The obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for the payment of bounties or pensions incident thereto, shall remain inviolate.'"

On June 4, 1865, the Senate, as a Committee of the Whole, resumed the consideration of the Joint Resolution and this amendment was agreed to. (Cong. Globe, June

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18. In his speech in support of this amendment Senator Wade said:

> "It puts the debt incurred in the Civil War on our part under the guardianship of the Constitution of the United States, so that a congress cannot repudiate it. I believe that to do this will give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a congress to repudiate it and placed under the guardianship of the Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress."

4, 1855, pp. 2938, 2941.) Had the Howard draft of Section four been finally adopted, it might have been claimed that the Amendment applied only to the then existing obligations of the United States. The change from the form of the Howard amendment to the present form is, however, highly significant and was clearly intended to formulate a constitutional principle applicable to all public debt, future as well as present. This is clearly shown by the Minority Report of the Joint Committee on Reconstruction which contains the following paragraph:

> "The repudiation of the rebel debt and all obligation to compensate for slave property and the inviolability of the debt of the government, *no matter how contracted,* provided for by some sections of the amendment, we repeat, we believe would meet the approval of many of the Southern States" (Dunning, *Political History of the U. S. During Reconstruction* (1880), pp. 93, 99). (Italics supplied.)

On June 6, 1866, the date of its final passage in the Senate, the fourth section, *in its present form,* was presented as an amendment, the amendment was concurred in, and the entire Joint Resolution was passed. (Cong. Globe, June 8, 1866, p. 3042). An amendment in the same form as Mr. Howard's (*supra,* p. 19), limiting its application to the debts incurred in the Civil War, *was rejected* (Cong. Globe, June 8, 1866, p. 3040).

The Joint Resolution, as amended by the Senate, was passed by the House of Representatives on June 13, 1866 (Cong. Globe, June 13, 1866, p. 3149).

The record thus discloses that the purpose of the fourth section of the Fourteenth Amendment was definitely to prevent any attempt either to repudiate or to scale down the principal of or interest on the public debt, no matter how or when contracted, by insuring that it should always be paid according to its tenor in gold coin of specific weight and fineness or in legal tender currency equivalent in worth to such gold coin.

No other construction can possibly be attached to Section four of the Fourteenth Amendment if the general rules of constitutional interpretation are applied. "Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question" (*Shreveport* v. *Cole*, 129 U. S. 36). The language of Section four surely does not look to the past alone. The phrases "public debt" "authorized by law", and "debts incurred" are general in terms and there is no limiting language in the text. Under the rule of *Shreveport* v. *Cole, supra,* it must, therefore, be construed to operate prospectively. It cannot be considered to be controlled by the particular occasion out of which it arose. The occasion may no longer exist, but the Constitution and its amendments remain effective to regulate analogous cases (W. D. Guthrie, *The Fourteenth Amendment* (1898), pp. 37, 38).

The clear purpose of Section four of the Fourteenth Amendment was to lay down a constitutional canon for all time, in order to maintain the national honor and to strengthen the national credit.

B

No provision of the Federal Constitution authorizes Congress to enact that portion of the Joint Resolution of June 5, 1933 which purports to abrogate the gold clause in the claimant's Liberty bond.

Every federal power must be express or implied from some power or group of powers, and any attempted exercise of power not delegated violates the Tenth Amendment to the Constitution.[19] The doctrine of inherent sovereignty does not apply to the federal government.[20] Nor does the Constitution specifically authorize the federal

19. This Court has never deviated from the doctrine expressed by Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326, to the effect that, "The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication."

20. *Kansas* v. *Colorado*, 206 U. S. 46.

government to alleviate national emergencies.[21] While a general scaling down of public indebtedness by making "gold clauses" inoperative and allowing the United States to pay in inflated currency might be a means of relieving the financial burden of the Government, neither the appropriateness of, nor the necessity for Federal action can create a Federal power.[22] Furthermore, it is constitutional heresy to claim that an act unconstitutional in normal times becomes constitutional because Congress deems that an emergency exists. The reverse of this doctrine has been firmly established ever since the Civil War.[23]

No provision in the Constitution authorizes Congress to provide for the general relief of debtors.

The power to establish "uniform laws on the subject of Bankruptcies" cannot be said to authorize all measures for the relief of debtors. "Bankruptcy" had a well-defined meaning long before the adoption of the Constitution and it is obvious that the application of this power is limited to laws "for the benefit and relief of creditors and their debtors, in cases in which the latter are unwilling or unable to pay their debts."[24] It cannot seriously be contended that the Joint Resolution of June 5, 1933, is such a law. In any event, in so far as this Resolution applies to obligations of

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21. The "general welfare" clause of the preamble of the Constitution does not confer any power at all (*Jacobson* v. *Massachusetts*, 197 U. S. 11), while the "general welfare" clause of Art. I, sec. 8 (1), is a limitation on the taxing power and not a grant of power. (*Ward* v. *Maryland*, 12 Wall. 418; *The Federalist*, No. 41).

22. *Kansas* v. *Colorado*, 206 U. S. 46; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Ward* v. *Maryland*, 12 Wall. 418; *Keller* v. *United States*, 213 U. S. 138; *Linder* v. *United States*, 268 U. S. 5; *Lynch* v. *United States*, 292 U. S. 571.

23. *Ex parte Milligan*, 4 Wall. 2; *Home Building and Loan Ass'n* v. *Blaisdell*, 290 U. S. 398; *Lynch* v. *United States*, 292 U. S. 571.

24. Story, *Commentaries on the Constitution*, section 1102 *et seq.*; *United States* v. *Fox*, 95 U. S. 670; *United States* v. *Pusey*, Fed. Cas. No. 16098; *In re Reiman*, Fed. Cas. No. 11673.

the United States, it is obvious that it may not be justified as a bankruptcy law since such authority may never be invoked by the sovereign to repudiate its own obligations.

Had it been intended that Congress should be empowered to legislate generally for the direct relief of all debtors, such power would have been expressly granted. The absence of such a general grant, and the presence of authority for the relief of insolvent debtors only, is conclusive proof that the power of Congress to relieve debtors is accordingly limited.[25] This doctrine, applied to the situation where the authority of Congress to abrogate the obligations of the United States was in question, was expressed in the *Sinking Fund Cases,* 99 U. S. 700, and was affirmed in *Lynch* v. *United States,* 292 U. S. 571.

Mr. Justice Strong, dissenting in the *Sinking Fund Cases,* where the issue upon which the dissent was based was the effect of a Congressional reservation of the right to amend a railroad charter, stated the general limitation upon the power of Congress to alter the provisions of a contract where the United States itself is a party, at page 737:

> "I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to *lessen* the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. . . . I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can by any direct action, otherwise than by a bankrupt law, *even relieve* a debtor to a private party from any duty he

25. It is not denied, of course, that the lawful exercise of an express power may also relieve debtors. In such instances, however, the relief provided is and must be merely incidental. [See: *Knox* v. *Lee* (12 Wall. 457) and *Juilliard* v. *Greenman,* (110 U. S. 421); and see particularly the quoted statement of Mr. Justice Bradley, *infra* at p. 41.]

> has assumed by his contract. . . . Such an exercise of power would be making a contract for parties to which they never assented." (Italics supplied.)

In *Lynch* v. *United States,* 292 U. S. 571, where the question was whether that provision of the Economy Act of March 20, 1933, which purported to repeal all laws granting or pertaining to yearly renewable term insurance (War Risk), was constitutional, Mr. Justice Brandeis said, at page 580:

> "Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts in the attempt to lessen government expenditures, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' The Sinking Fund Cases, 99 U. S. 700, 719, 25 L. Ed. 496."

The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in the claimant's Liberty Bond, is not an exercise of the power "To borrow Money on the Credit of the United States."

It is inconceivable that anyone could consider the abrogation of gold clauses in existing governmental obli-

gations an exercise of the borrowing power.[26] Here, if nowhere else, lies a fundamental distinction between the present statute and the Legal Tender Acts of 1862 and 1863.[27] If this Joint Resolution had not destroyed the gold

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26. It is not, of course, denied that in the exercise of the borrowing power Congress may refuse to assume the risk of depreciation in the value of legal tender currency by omitting gold-clause provisions from the future obligations of the Government. An attempt to evade that risk already assumed, by shifting it to its creditor, particularly when the possibility of loss is imminent and is the result of the very act of the Federal Government, is quite another thing. Nevertheless, Mr. Steagall, in sponsoring the Resolution, attempted to support this practise as an exercise of the borrowing power by the following (77 Cong. Rec. (House) May 29, 1933, p. 4583):

> "Surely it is not desirable to have outstanding two classes of obligations incurred by the Government—one to be discharged by the payment of gold, and the other by a different kind of money" * * * "So far as the future is concerned, the power to borrow both of the Government and of private interests, will be seriously impaired unless outstanding obligations and future obligations are placed upon the same footing *in respect of the medium of payment.*"

To the same argument of lesser marketability of new issues of bonds not containing a gold clause by Senator Fletcher Chairman of the Senate Committee on Banking and Currency and the sponsor of the resolution, Senator Fess replied (77 Cong Rec. June 3, 1933, p. 4915):

> "Then, if we do not write in the gold clause, our bonds will not be marketable, as is admitted by the proponents of the measure. They want to make them marketable and the only way they can do it is to drag down to the level of the issue they must make, all existing Government bonds that now have the gold clause. * * * To me, it is the most amazing thing that has ever been promulgated in finance so far as I know."

It is significant that no reference was made to the gold-value provisions of the Resolution either in the majority Report of the House Committee on Banking and Currency nor by Mr. Steagall in sponsoring it. Obviously the claimant's Liberty Bond, payable in currency, is "upon the same footing in respect of the medium of payment" as other currency obligations of the government, and Mr. Steagall's alleged justification for the discrimination contained in the Joint Resolution is irrelevant.

27. These Acts were finally sustained as an exercise of the borrowing and currency powers on the theory that the Government was borrowing on the legal tender currency authorized thereby. At the same time a medium of exchange was provided. These powers were, therefore, used in direct support of each other. See, *Knox* v. *Lee*, 12 Wall. 457; *Juilliard* v. *Greenman*, 110 U. S. 421.

clause in the obligations of the United States, but had only invalidated those contained in the obligations of private persons, corporations, states, and municipalities, it might have been argued that Congress was exercising authority necessarily incident to the borrowing power in that it was destroying obligations which affected or interfered with that power.[28] Even this argument is necessarily refuted by the fact that Congress has included in the Joint Resolution "obligations of the United States". Our conclusion cannot be more aptly stated than in the words of Mr. Justice Brandeis:

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."[29]

The Joint Resolution of June 5, 1933, in so far as it purports to abrogate the gold clause in claimant's Liberty Bond, does not come within the scope, express or implied, of the power "To coin Money, regulate the Value thereof, and of foreign coin, and fix the Standard of Weights and Measures".

The coinage power does not expressly authorize Congress to render unenforcible gold or gold-value obligations of the United States. The claimant contends that the authority to enact a law purporting to emasculate

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28. See *Veazie Bank* v. *Fenno*, 8 Wall. 533.

29. *Lynch* v. *United States*, 292 U. S. 571. Manifestly the abrogation of gold clauses in obligations of the United States Government is a repudiation of these obligations, tending to destroy the credit of the Federal Government. To hold the Joint Resolution of June 5, 1933, constitutional, would necessarily be to hold that the borrowing power is limited by the currency power, and that the borrowing power could thereby be wholly destroyed. That no such limitation was intended is obvious; it cannot be found in the Constitution itself or in the decisions of the Supreme Court construing it.

every obligation containing a gold-clause may not be implied from these powers.[30]

The three cases which have in some measure defined the extent of the coinage power hold in general that it authorizes the establishment of a sound and uniform national currency.

Veazie Bank v. *Fenno,* 8 Wall. 533;
Knox v. *Lee,* 12 Wall. 457;
Juilliard v. *Greenman,* 110 U. S. 421.[31]

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30. Subsection (18) of Article I, Section 8, authorizes Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It has been held, however, that this subsection is neither a limitation nor an expansion of powers already granted, but that it merely reiterates what would have been implied had the Constitution contained no such provision. Consequently, the constitutionality of a particular statute depends entirely upon whether or not the right to exercise the authority thereby asserted may reasonably be implied from the express grant of a certain power or powers. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Ex parte Merryman,* 17 Fed. Cas. 144, 148; *U. S.* v. *Rhodes,* 27 Fed. Cas. 785, 792; *The Federalist,* No. 33.

31. In the first of these cases, *Veazie Bank* v. *Fenno,* the Supreme Court upheld the constitutionality of a tax on state bank notes used for circulation, even though it was apparent that no revenue could be obtained and that state banks necessarily would have to cease issuing such notes. The Court held that Congress, apart from taxing powers, could destroy state bank notes which undermine national currency, since the power to "coin Money, (and) regulate the Value thereof" authorized the establishment of "a currency, uniform in value and description, and convenient and useful for circulation."

Knox v. *Lee,* following shortly thereafter, upheld the constitutionality of the issue of irredeemable "greenbacks" as legal tender under several express powers, referring specifically to the war power, the power to borrow money, and the power to coin money. Justice Strong, writing the opinion for the majority, stated that the Constitution "was designed to provide the same currency, having a uniform legal value in all the States."

In *Juilliard* v. *Greenman,* after the fiat money had been redeemed and reissued, the Supreme Court upheld the legal tender acts under the coinage and borrowing powers alone.

These cases, however, do not decide that Congress may control obligations which are not currency, such as the claimant's Liberty Bond. The particular legislation in the *Veazie Bank* and *Legal Tender* cases (*Knox* v. *Lee* and *Juilliard* v. *Greenman*) applied directly to the control of the current media of exchange. In the former case the tax statute in effect destroyed state bank notes which circulated as money. The *Legal Tender* cases merely sustained the issuance as legal tender of irredeemable "greenbacks", a form of currency.

Nor has it ever been decided that Congress may control obligations not currency on the theory that such obligations affect the value of money.[32] The power of Congress was intended to be and is limited to the issuance and the direct regulation of the kind, amount and value of currency. Congress has no general power, to regulate and control the kind, quality, amount, production or prices of all property.[33] Contract obligations, including obligations to pay money, have always been recognized to be property within the meaning of this rule.[34] It has never even been sug-

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32. It may, of course, be argued that the *Veazie Bank* case establishes the rule that Congress may regulate or destroy anything which interferes with the issuance or value of the national currency, but actually nothing more was decided than that Congress had the power to extinguish all obligations circulating as money. The absurdity of such extension of the delegated powers is plainly shown by an illustration of the possible exercise of the borrowing power over things which "interfere" with its exercise by Congress. On such a theory, Congress could prohibit the borrowing of money by individuals, corporations, municipalities and states, since the market for Government securities is limited by such borrowing.

33. It should be noted that, where price regulation has been justified under the commerce power, it has involved businesses "affected with public interest". *Bluefield Co.* v. *Public Service Comm.*, 262 U. S. 679. In other words, the doctrine of *Munn* v. *Illinois*, 94 U. S. 113, applies as well to Federal as to State regulation of industry. In the exercise of the war power this rule is necessarily somewhat relaxed. See, *Highland* v. *Russell Car Co.*, 279 U. S. 253.

34. "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch* v. *United States*, 292 U. S. 571.

gested that the currency power gives Congress authority to fix the value of any obligation that does not circulate as money, on the theory that the value of money is regulated thereby.[35]

The fact that the currency power must be held to be limited to the direct regulation of the media of exchange becomes more apparent when Section 10 of Article I is considered. It is there provided, as far as is relevant, that "No State shall . . . coin Money; (or) emit Bills of Credit; . . ." This clause has been held merely to prevent the States from issuing currency and not to prevent the issuance of "Bills of Credit" which do not circulate as media of exchange.[36] Its purpose has uniformly been said to be

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35. It should also be noted that Clause 5 of Article 1, Section in addition to the grant of the currency power, authorizes Congress to "fix the Standard of Weights and Measures". The States, within their police powers, have similar authority. *Dwight, etc. Sintering Co.* v. *American Ore Reclamation Co.*, (C. C. A. N. Y.) 263 Fed. 315 (cert. denied 252 U. S. 582). The extent of such regulation, however, has been specifically limited. Thus, in the case of *The Miantinomi* (C. C. Pa.) 17 Fed. Cas. No. 9,521, while expressing doubt of the power of a State to enact the statute in question, stated, at page 256:

> "Men may contract either with or without its sanction to make the pound their unit, and to sell at so much per 100 lbs.—or so much for 2,000 lbs., and they may call it, or any other multiple of a pound, a ton, if the parties to the contract agree to do so. But this act, if it have any efficacy whatever, (which, as I have intimated, is doubtful,) cannot be invoked to change the terms of a contract contrary to the consent of one of the parties, or to authorize vendors who buy coal at one standard or weight to sell it an another, and thus extort from purchasers an increased price for a diminished quantity."

36. The issue of legal tender currency by the United States was justified, although no specific power was given Congress to "emit Bills of Credit" and in spite of the fact that the intent of the framers of the Constitution had apparently been that Congress should have no such power. For this reason the power "To coin Money, (and) regulate the Value thereof" alone was not considered to authorize the legal tender acts. A cursory reading of the *Legal Tender Cases* will illustrate the great reliance placed on the "borrowing power". It has been shown, however, that the Joint Resolution of June 5, 1933, cannot be considered to be an exercise of that power.

that of making effective the affirmative power over currency granted to Congress.[37]

While it is true that this Section purports to curtail State powers alone, it should also be considered as a Constitutional definition of the powers granted to Congress. Since the intent was to make effective the affirmative authority granted, the limitation on the power of the States to deal with the same subject matter clearly should be as broad as that grant. To the extent that the Constitution prohibits the States from exercising the currency power granted to Congress, it impliedly forbids Congress the right to extend those powers beyond the restraint placed on the States. For this reason the cases defining the scope of the limitation upon the States, must likewise be considered as prescribing the extent of Congressional power.

It may thus be said that Congress has the authority to establish a sound and uniform national currency, and to that end may regulate and control all things which circulate as money. Congress may not, however, exercise police power over private obligations on the theory that they affect the value of money.

The claimant's Liberty Bond cannot be classified as currency; it does not and could not circulate as money. As has been shown, this bond is not an obligation to pay gold, but merely to pay gold-value (Point One, *supra*) and cannot be said to be any different from any other obligation to pay money which does not circulate as a medium of exchange. It is not, consequently, subject to the regulation of Congress in the exercise of its coinage power and, in so far as the Joint Resolution of June 5, 1933, purports to invalidate the gold value provisions of this bond, Federal powers are exceeded and this Resolution is unconstitutional and void.

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37. *Ogden* v. *Saunders*, 12 Wheat. 213; *Craig* v. *Missouri*, 4 Pet. 410; *Briscoe* v. *Kentucky Bank*, 11 Pet. 257; *Darrington* v. *Branch of Alabama Bank*, 13 How. 12; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Houston etc., R. Co.* v. *Texas*, 177 U. S. 66.

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The Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold-clause in the claimant's Liberty Bond, violates the Fifth Amendment to the Constitution in that it deprives the claimant of his property without due process of law.

It is well settled that for a statute to be constitutional it cannot be arbitrary or capricious, but must be reasonably related to an object entrusted to the Federal Government.[38] The claimant contends that that part of the Joint Resolution of June 5, 1933, which purports to invalidate the gold-value clause in claimant's Liberty Bond is unreasonable, arbitrary, and capricious; it is not reasonably appropriate to any legitimate legislative end; the purpose of its enactment is not comprehended within the objectives of the powers delegated to Congress; and it is, therefore, unconstitutional and void as a violation of the Fifth Amendment to the Constitution.

Manifestly, if this statute may be justified at all, it must be as an exercise of the currency power. It has been shown

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38. The most recent expression relating to the limitation of the Fifth and Fourteenth Amendments is found in *Nebbia* v. *People of the State of New York*, 291 U. S. 502, wherein it was stated:

"* * * the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In 1819, Chief Justice Marshall, writing the opinion for this Court in *McCulloch* v. *Maryland*, 4 Wheat. 316, pointed out that the end must be legitimately within the scope of the Constitution and said:

"Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

See also, *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1; *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20.

that the other Congressional powers do not authorize any such legislation (Point Two, B, *supra*) and Congress itself has left no doubt that the enactment was intended as an exercise of the currency power. Thus, the preamble of the Joint Resolution of June 5, 1933, reads:

> "To assure uniform value to the coins and currencies of the United States.
> "Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and
> "Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts."

This preamble must be considered as an official statement of the facts upon which the specific exercise of power is predicated and as a declaration of the objects sought to be attained thereby. With regard to that part of the Joint Resolution which purports to invalidate the gold clause in the claimant's bond, even a cursory examination of the preamble will show both that these asserted justifications are spurious and that that part of the Joint Resolution cannot accomplish those ends.

The preamble states that the object of the Joint Resolution is "To assure uniform value to the coins and currencies of the United States" and that gold coin and gold-value clauses "obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, * * *". This is an obvious attempt to bring the operation of the Resolution within the scope of Article I, Section 8 (5) of the Constitution authorizing Congress "To coin Money, (and)

regulate the Value thereof * * *". At the time of the enactment of this statute there was, however, but one form of currency (other than token money) in circulation, irredeemable paper money. All of this currency was necessarily based on the same standard and each dollar of this currency was equal in value to every other dollar.

The claimant's bond was merely an obligation to pay an adjustable value in such legal tender currency, and was not an obligation to pay in a particular kind of money. The purpose of the gold clause therein was to provide a measure of the obligation and its only possible effect is to fix the amount of legal tender currency payable in satisfaction thereof. How such provisions "obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar" and how their abrogation will "assure a uniform value to the coins and currencies of the United States", is difficult to comprehend.[39] There was not then, nor can there be under existing circumstances, any disparity between the value of the kinds of currency lawfully in circulation and Congress was untrammeled in its power to issue other forms of currency, to increase or decrease the amount of money in circulation, to change the standard, to declare what is and what shall be legal tender, to prohibit the circulation of unauthorized forms of currency, or otherwise to regulate the value of money.

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39. This purpose is carried out, however, in Section 2 of the Joint Resolution of June 5, 1933, which amends Section 43 of the Act of May 12, 1933, to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

This Section 2 obviously has no necessary relation to the first paragraph of the Joint Resolution which purports to abrogate the gold-clause in the claimant's bond.

Furthermore, the second paragraph of the preamble of the Joint Resolution of June 5, 1933, is misleading. It is there inferred that this statute is a regulation of the "holding of or dealing in gold", which, it is stated, "affect the public interest and are therefore subject to proper regulation and restriction; * * *." It is not denied that the "holding of or dealing in gold" may "affect the public interest" and for that reason be "subject to proper regulation and restriction".[40] However, the "holding of or dealing in gold" had already been prohibited.[41] A further regulation, not abrogating or in some measure altering the former prohibitions, could be of no effect and could only have been intended to disguise the real purpose of the Joint Resolution.

It is thus clear that, if the purposes of the enactment of the Joint Resolution of June 5, 1933, are those expressed in the preamble, the actual operation and effect of that statute can have no real and substantial relation to those purposes. Unless, therefore, it may be said that the statute will accomplish some other legitimate purpose, it is unconstitutional and void.[42]

The claimant contends that the Joint Resolution of June 5, 1933, in so far as it purports to abrogate the gold clause in the Claimant's bond, cannot be considered to be a regulation of the value of money.

The ordinary means by which the value of the currency may be and has been regulated is by changing the base at

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40. See *Ling Su Fan* v. *United States*, 218 U. S. 302.

41. Trading with The Enemy Act, 40 Stat. 411 (1917); Act of March 9, 1933, 48 Stat. 2; Presidential Proclamation of March 6, 1933; Executive Orders of April 5, 1933, and August 28, 1933. See also 33 Columbia Law Review 617 (1933).

42. It is clear that this Court is not bound by recitals contained in a preamble to a statute as to its alleged purpose, but will look to its actual operation and effect, and, if there is thereby an attempt to exert authority not vested in the legislative body enacting the statute, will declare it unconstitutional and void. *Coppage* v. *Kansas*, 236 U. S. 1, 14, 16; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 536.

which it had previously been stabilized,[43] or by issuing more currency, thus creating a greater supply. Congress has also issued a new form of currency stabilized at a new base, different from pre-existing standards.[44]

The present statute does not and did not, at the time of its enactment, do any of these things. Gold payments were then, and have since remained suspended.[45] The outstanding currencies, thus, if stabilized at all at that time, must be considered to have been stabilized in terms of one dollar obligations and these currencies were and are legal tender, dollar for dollar, in the payment of dollar obligations. The Joint Resolution of June 5, 1933, stated, in effect, that both gold and gold-value obligations were payable, dollar for dollar, in this same currency. This Resolution, therefore, purported simultaneously to standardize the unit of currency in terms of dollar, gold dollar, and gold-value obligations. That this is unreasonable, arbitrary, and capricious and cannot be considered to be a regulation of the value of currency may easily be shown.

It is not denied that Congress may issue currency and designate its worth in terms of property; it may fix its value at the equivalent of a certain number of grains of gold of a specified weight and fineness, or of a certain amount of any commodity or group of commodities.[46] However, to issue money without intrinsic worth (i. e., irredeemable paper) and not designate its value in property would be absurd. (The Legal Tender Act of 1862

43. See: 4 Stat. 699 (1834); 10 Stat. 160 (1853); 17 Stat. 426 (1873); Act of May 12, 1933, 48 Stat. 31; Act of January 30, 1934, 48 Stat. 337.

44. Legal Tender Acts, 12 Stat. 345 (1862), 12 Stat. 532 (1862), 12 Stat. 709 (1863), making one dollar obligations the standard.

45. Trading with the Enemy Act, 40 Stat. 411 (1917), Presidential Proclamation of March 6, 1933; Emergency Banking Act of March 9, 1933 (48 Stat. 2), Executive Orders of April 5, 1933, and August 28, 1933; Act of May 12, 1933, (48 Stat. 31); Gold Regulations of the Secretary of the Treasury, September 12, 1933; Orders of the Secretary of the Treasury, December 28, 1933, and January 15, 1934; Gold Reserve Act of January 30, 1934 (48 Stat. 337); Presidential Proclamation of January 31, 1934 and Provisional Regulations of the Secretary of the Treasury issued under the Gold Reserve Act of 1934, January 31, 1934. The Presidential Proclamation of January 31, 1934, stating that thereafter the weight of the gold dollar should be 15$\frac{5}{21}$ grains of gold .9 fine did not change this situation since, for all practical purposes, all money in circulation was irredeemable.

46. See Sedgwick on *Damages*, 9th ed, sec. 266.

providing for the issue of "greenbacks", since no means of redemption was specified, in effect stabilized this unit of money in terms of one dollar obligations.) Value, as distinguished from utility, is never absolute, but always implies a ratio—a relation to another property or properties. Such a relation necessarily imports specific quantities and qualities.[47] To state that the same unit of currency is at the same time equal in value to a certain amount of property of a given quality and to a different amount of the same property is to state an impossibility.[48] Granting that the unit of currency may be stabilized in terms of dollar obligations, a statute purporting to make the standard both a one dollar obligation and an obligation of one dollar and one cent would be a regulation of the value of obligations and not of currency, and would, therefore, be unreasonable, arbitrary, and capricious.[49] The Joint Resolution of June 5, 1933, purporting to invalidate gold clauses, if it could in any way be said to be an attempt to regulate the value of money, similarly purports to standardize the unit of currency at obligations of different values.

The claimant's bond by its tenor may be satisfied by the payment of legal tender money in a sum equal to the gold-value of its face amount. Ordinarily the gold-value in legal tender currency is no greater than the face amount of the instrument. When, however, gold payments have been suspended, gold-value obligations, although they may still be satisfied by payment in legal tender currency, remain at par with gold, but, ordinarily, are at a premium

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47. Thus the dollar recently was valued at 25.8 grains of gold .9 fine.

48. For example, Congress could not stabilize the dollar at 25.8 grains of gold .9 fine and contemporaneously stabilize it at 15$\frac{5}{21}$ grains of gold .9 fine. Whatever it may be called, this would not be a regulation of the value of money.

49. It has uniformly been held that the power to determine the amount or value of contract obligations is a judicial and not a legislative function. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327-8; *United States* v. *Lynah*, 188 U. S. 445, 471-2.

in terms of irredeemable currency.[50] This was the situation when the Joint Resolution of June 5, 1933, was enacted[51] and, if this statute is given effect, an ordinary one dollar obligation and a similar gold-value obligation could both be satisfied by the payment of the same unit of currency. This Joint Resolution was, therefore, an attempt simultaneously to stabilize the unit of currency at two obligations for the payment of money, which obligations were definitely different in value. Manifestly this cannot be considered to be a regulation of the value of money within the currency power.[52]

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50. Such disparity has been recognized by the courts on numerous occasions. See *Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258; *Thompson* v. *Butler*, 95 U. S. 694.

51. See index of wholesale commodity prices on a gold basis, contained in The Annalist Weekly of December 14, 1934, at page 817, and reproduced by permission in Appendix p. xiv.

52. In the debate in the Senate on the Joint Resolution on June 3, 1933 (77 Cong. Rec. pp. 4901-2) Senator Glass of Virginia, the recognized Democratic authority on matters of banking and currency, refusing to be stampeded by the Government, riddled the claim put forward by the sponsors of the Resolution that its abrogation of the gold clause in existing contracts was a valid exercise of the power "to regulate the Value" of money, and stigmatized it as pure repudiation.

"Mr. Borah. The National Government, in the exercise of its sovereign power, such as the coinage of money and regulating the value thereof, cannot be restrained by contractual relations. It would not be contended for a moment, I presume, that by reason of contracts, either of the Government under the authority of Congress or between private parties, there could be impaired, embarrassed, circumscribed, or limited the sovereign power of the Government to coin money and regulate the value thereof.

Mr. Glass. Mr. President, does the Senator contend that it is competent for the Congress to declare that 12.9 grains of gold constitute 25.8 grains of gold?

Mr. Borah. No; I do not contend that, but I contend that Congress may declare that a dollar with 12.9 grains must be accepted in payment of a dollar of 25.8 grains. It may fix the value of the dollar, the value of money.

Mr. Glass. Is not that the contention, in the last analysis? When a contract requires the Government to pay the holder of its obligation 25.8 grains, is it competent for Congress to say that the Government shall pay him 12.9 grains?

Mr. Borah. I contend when an individual takes an obligation payable in gold, specified as suggested by the Senator, that he takes it with the

Nor may it be said that gold-value obligations affect the value of money in any manner justifying Congressional regulation. Gold-value contracts do not affect the value of money in any greater measure than do other money obligations or commodity contracts.[53] Any regulation increasing

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full understanding that the Government may change its monetary policy at any time and that he must accept whatever the Congress says at a particular time shall constitute money. I am not discussing now a commodity contract; I am discussing a contract to pay dollars.

Mr. Glass. I submit that it does not relate to that monetary policy of the Government at all. The contract does not say that the Government shall pay so many dollars. It says the Government shall pay so many grains of gold, to wit, 25.8 grains. Is it competent for Congress to say that contract is fairly met if the Government says it will pay only 12.9 grains? The contracts provide that the Government shall pay so much money of a certain weight and fineness.

Mr. Borah. Yes; but it is money. It is dollars to be paid, although the dollars are supposed to be so much gold, but it is dollars.

Mr. Glass. Yes; but it is money of a certain weight and fineness.

Mr. Borah. Exactly; but if the Government sees fit to change the weight and fineness and still make it money, the individual must accept the money of the weight and fineness fixed.

Mr. Glass. In other words, the Senator contends that the Government can legitimately declare that 2 ounces make a pound?

Mr. Borah. No; I do not declare anything of that kind. I contend the Congress may fix the value of the dollar as to its gold content. I declare that when the Government says it will pay a certain number of dollars, and designates those dollars of a certain weight and fineness, it may thereafter exercise the power to name what the dollar shall be and to say that the dollar shall be of a different weight and fineness, and the individual must accept that dollar. * * *

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Mr. Glass. As I said to the Senator, I am not contesting the point that the Senate can exercise its constitutional right to coin and fix the value of money. I do not think that is involved. I think what is involved is that the Government has agreed with the holders of the bonds to pay them 28.8 (sic) grains of gold of existing fineness, and if it pay them any less than that it is repudiation."

53. The only possible effect that gold-value contracts may have on the value of money is by affecting the demand for money. It is undoubtedly true that if the supply of currency and the rate of circulation were constant, then the value of money would fluctuate directly as the demand. The effect upon that demand of the payment in gold-value of Federal obligations upon the retirement of such obligations, spread over the years of their respective maturities, would, however, be negligible.

or decreasing the amount that obligees may recover from the obligors of gold-value contracts, has no more effect on the value of the medium of exchange than would a regulation increasing or decreasing the rights of obligees of any other class or classes of contracts to pay money, or for that matter, the rights of promisees of agreements for the delivery of commodities.[54] No one would contend that Congress has the power to lessen the obligation of all contracts on the theory that it is thereby regulating the value of money.[55]

The claimant further contends that the Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in the claimant's Liberty Bond, will not accomplish, or have a reasonable relation to, any proper legislative object.

The only purpose of the Joint Resolution of June 5, 1933, insofar as it purports to abrogate the gold clause in the obligations of the United States, was to secure the release of a portion of the Government's obligations by the re-

54. In every contract to be performed in the future one or the other of the parties thereto must bear the risk of loss due to fluctuation in value of the subject of the contract. In the ordinary contract for the payment of money, the risk of loss arising from an increase in the value of money rests upon the debtor; that resulting from its decrease upon the creditor. Yet it is not to be contended that Congress has power to shift these risks on the theory that it is regulating the value of money. The logical extension of this doctrine would be to hold that Congress could forbid persons from protecting themselves against risk of loss in any situation, an obvious impossibility; and further, since this risk must fall on someone, that Congress could, *ex post facto*, choose the person upon whom it shall fall. The Federal Government, by its own insertion of the gold-clause in claimant's Liberty Bond, has voluntarily assumed the risk ordinarily borne by the creditor. It now seeks to transfer to its creditor the loss caused by its own act of devaluation, the very contingency which it itself contemplated when it issued claimant's bond.

55. In *Hepburn* v. *Griswold*, 8 Wall. 603, at page 625, Chief Justice Chase, speaking for the Court, said:

> "No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary deprivation of property."

pudiation of a material term in its contracts.[56] The purpose of the Joint Resolution of June 5, 1933, in this respect, was not to execute or make effective any of the powers granted to Congress, but, under the guise of an exercise of the currency power, to commit an act of repudiation. This practice was first condemned by the Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423, where Chief Justice Marshall stated:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

With specific application to contractual obligations of the Federal Government, Mr. Justice Strong, who wrote the opinion of the Court in the *Legal Tender Cases,* expressed the doctrine in his dissenting opinion in the *Sinking Fund Cases,* 99 U. S. 700, at page 739, as follows:[57]

> "• • • I deny that an acknowledged power can be exerted solely for the purpose of effecting indirectly an unconstitutional end which the Legislature cannot directly attempt to reach. If the purpose were de-

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56. The abrogation of gold clause provisions in Federal obligations can no more be considered an exercise of the currency power than was the repudiation by the Government of renewable War Risk insurance policies. The Government did not even attempt to justify that repudiation under the currency power in *Lynch* v. *United States,* 292 U. S. 571-579. The relief afforded the United States is approximately the same in each instance. The only effect on the value of money produced in either case would be indirectly by a slight reduction in the demand for currency. A slight diminution in general business would have the same effect.

57. The majority of the Court found that Congress had reserved the right to change the contracts in question. Justices Field, Strong and Bradley dissented on the ground that the reservation made did not permit the particular modification. Based on this premise the conclusions reached in their dissenting opinions was inescapable and were the necessary result of *The Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518.

> clared in the act, I think no court would hesitate to pronounce the act void. * * *"
>
> "It is unnecessary, however, to enlarge upon this, for the effect wrought upon the contracts of these two companies is a direct effect,—a direct alteration of the obligation assumed by the debtors, and not an incidental result of legislation upon some other subject over which Congress has a right to legislate."

Even if that part of the Joint Resolution of June 5, 1933, which purports to abrogate existing gold clause obligations might in any way be considered to be an exercise of the power "To coin Money, (and) regulate the Value thereof", it must, to the extent that the gold clause in the claimant's Liberty Bond is affected, deprive the claimant of his property without due process of law and be a violation of the Fifth Amendment to the Constitution.

When Congress, by the Act of September 24, 1917, as amended, authorized the issuance of the claimant's Liberty Bond and provided that it should be payable "in United States gold coin of the present standard of value", it thereby exercised its power "to regulate the Value" of money in respect of this obligation; and when the claimant, in reliance thereon and on the faith thereof, parted with his property for the benefit of the United States, he acquired a vested right which cannot be taken or destroyed by any subsequent act of Congress and any attempt so to do without payment of just compensation is a denial of due process and a violation of the Fifth Amendment to the Constitution. *Lynch* v. *United States,* 292 U. S. 571, 579; *Choate* v. *Trapp,* 224 U. S. 665, 678.

Mr. Justice Bradley, who wrote a concurring opinion in the *Legal Tender Cases* stated in his dissenting opinion in the *Sinking Fund Cases, supra,* at page 747, as follows:

> "The legal-tender laws may have indirectly affected contracts, but did not abrogate them. The

case before us is totally different. It is a direct abrogation of a contract, and that, too, of a contract of the government itself,—a repudiation of its own contract."

It has been shown that the purpose of the Joint Resolution of June 5, 1933, was not to accomplish any of the legitimate objects entrusted to the Federal Government; that the law has no real and substantial relation to any Congressional power; that its real purpose and actual effect is to reach ends not subject to Federal control; and that it operates to take the property of the claimant without compensation, for the benefit of the United States; that the Joint Resolution of June 5, 1933, deprives the claimant of his property without due process of law and thereby violates the Fifth Amendment to the Constitution.

POINT THREE

The claimant in any event is entitled to recover just compensation for the taking of his property for public use.

Contract rights have always been held by this Court to be property protected by the Fifth Amendment for the taking or appropriation of which, for public use, even under a paramount power, just compensation must be paid to the owner.[58] Even if the Joint Resolution of June 5, 1933, in so far as it required generally the discharge of gold or gold-value obligations in legal tender currency, should be held to be a valid exercise of delegated power, the *direct* repudiation by it therein of claimant's existing contract with defendant constitutes a 'taking' of claimant's property thereunder, which, even under the exercise of a para-

58. *Lynch* v. *United States*, 292 U. S. 571, 579; *Sinking Fund Cases*, 99 U. S. 700, 719, 744-5, 746, 746-7; *Phelps* v. *United States*, 274 U. S. 341; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106.

mount power, implies an agreement in fact to pay just compensation therefor, protected by the Fifth Amendment.[59]

In the *Sinking Fund Cases*, 99 U. S., 700, Mr. Justice Bradley said at pp. 744-5, 746, 746-7:

> "It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled."
>
> "But if it were not, as it is, an actual or physical taking of property,—*if it were merely the subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law.*" (Italics supplied.)

Even were the portion of the Joint Resolution authorizing payment in legal tender upheld, that part of the Resolution which attempts to *fix the just compensation* for such taking at "*dollar for dollar*" in legal tender would in any event, be utterly void, as an attempted exercise of judicial power by the legislature.[60] The judicial measure of that just compensation is the value of the property as of the date of taking.[61]

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59. This doctrine has been affirmed without question in the following cases: *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336-7; *Sinking Fund Cases*, 99 U. S. 700, 718-9, 744-5, 746, 746-7; *United States* v. *Lynah*, 188 U. S. 445; *Seaboard Air Li · Ry.* v. *United States*, 261 U. S. 299, 306; *Lynch* v. *United States*, 292 U. S. 571, 579; *Liggett & Meyers Tobacco Co.* v. *United States*, 274 U. S. 215; *Jacobs* v. *United States*, 290 U. S. 13, 17; *Phelps* v. *United States*, 274 U. S. 341, 343; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 119-20, 123; *Philippine Sugar Estates Dev. Co.*, v. *United States*, 40 Ct. Cl. 33.

60. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327-8; *United States* v. *Lynah*, 188 U. S. 445, 465; *Sinking Fund Cases*, 99 U. S. 700, dissenting opinion of Justice Field at pages 759-60, 761.

61. *Olson* v. *United States*, 292 U. S. 246; *Seaboard Air Line Ry. Co.* v. *United States, supra.*

The value of the property on the date of taking is the same as the damages claimed for the breach of the express contract, for the date of breach of contract and the date of taking is the same. In any case, neither the breach of the express contract nor the taking and appropriation by defendant of claimant's property were complete until the claimant's bond had been called for redemption and defendant had refused to pay according to the tenor of the bond. Both of these events happened on May 24, 1934, when the bond was presented to the Treasury Department for payment. The just compensation is, therefore, equal in amount to the relief asked for in the petition.

II

The Court of Claims has jurisdiction to entertain the claimant's action against the United States.

The petition herein states at least two good causes of action against the United States within the jurisdiction of the Court of Claims: (1) for breach of an express contract with the United States set out in the claimant's Liberty Bond, and (2) a cause of action founded upon the Constitution of the United States for breach of a contract implied in fact to pay just compensation for the taking of the claimant's property. Both of these causes of action fall within the jurisdiction of the Court of Claims.

Section 145 of the Judicial Code gives to the Court of Claims jurisdiction to hear and determine "all claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contracts, express or implied with the Government of the United States * * *".

Phelps v. *United States,* (274 U. S. 341) held that a claim for just compensation for the use of property taken by the Government is "founded upon the Constitution"

and is based on a contract implied in fact within the meaning of Section 145 of the Judicial Code and that a claim for just compensation for property taken for public use by officers or agents of the United States pursuant to an Act of Congress, is a claim founded upon such an implied contract.

CONCLUSION.

For all the reasons above set forth the claimant submits that both questions certified to this Court by the Court of Claims should be answered in the affirmative.

Respectfully submitted,

JOHN M. PERRY,
Claimant.

Of Counsel:

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET.

APPENDIX.

Statement of Facts and Certificate

Messrs. Larkin, Rathbone & Perry appeared for the plaintiff.

Messrs. George C. Sweeney, William W. Scott, and Harry LeRoy Jones appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley

Statement of Facts

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following facts, stated in plaintiff's petition filed June 22, 1934:

1. That ever since January 1, 1933, and for a number of years prior thereto, petitioner has been the owner and registered holder of an obligation of the United States of America, in principal amount of $10,000, known as Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, Serial Number 19831 (a copy of which is annexed in Schedule A), which is one of a series of four and one-quarter per cent, gold bonds of 1933-1938 authorized by an Act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918 (a copy of the relevant provisions of [fol. 2] which is annexed in Schedule B), wherein and whereby the defendant, as authorized by said Act and amendments thereto, promised to pay to your petitioner, or his registered assigns, on October 15, 1938, or at any time after October 15, 1933, at the pleasure of the defendant, said principal sum in United States gold coin of the standard of value on the date of issuance, and to pay in-

terest in like gold coin on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920, on April 15 and October 15 in each year, until the principal thereof should be payable.

2. That under and pursuant to the Laws of the United States, namely, an Act approved March 14, 1900, (31 Stat. 45,) which was in force on September 24, 1917, at the time of the issuance of said bond, and at the time of the acquisition of the same by your petitioner, a dollar in gold consisted of 25.8 grains of gold .9 fine.

3. That by virtue of the agreement between your petitioner, as the owner and registered holder of said bond, and the defendant, pursuant to whose authority said bond had been issued, and said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, your petitioner was entitled to receive from the defendant at the time of the maturity of said bond, whether by redemption or otherwise, 10,000 gold dollars each containing 25.8 grains of gold .9 fine.

4. That on October 12, 1933, the defendant, through and by the Secretary of the Treasury, in Treasury Department Circular No. 501, dated October 12, 1933, (a copy of the relevant provisions of which is annexed in Schedule C,) and pursuant to said Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121, called for redemption on April 15, 1934, a part of said [fol. 3] issue of Fourth Liberty Loan 4¼% Gold bonds of 1933-1938, namely, among others, all outstanding registered bonds bearing serial numbers the final digit of which was 1.

5. That the final digit of the Serial Number of said bond of which your petitioner is the owner and registered holder is 1, the Serial Number being 19831, and said bond is one of those called for redemption on April 15, 1934, as aforesaid.

6. That after April 15, 1934, and on May 24, 1934, your petitioner duly presented said bond to the defendant at the Division of Loans and Currency, Treasury Department, Washington, D. C., in accordance with said Act of September 24, 1917, as amended, said Treasury Department Circular No. 121, and said Treasury Department Circular No. 501, and demanded of said defendant that it redeem said

bond by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine.

7. That said bond when presented was properly assigned to "The Secretary of Treasury for redemption", as provided in said Treasury Department Circular No. 501.

8. That the defendant refused to comply with your petitioner's demand and refused to redeem said bond in the manner specified therein and as prescribed by the Act of September 24, 1917, as amended, and said Treasury Department Circular No. 121.

9. That your petitioner then demanded of said defendant 258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing $15\frac{5}{21}$ grains of gold .9 fine, or 16,931.25 dollars in legal tender currency.

[fol. 4] 10. That the defendant refused to accede to your petitioner's demands, or any one of them, and refused to redeem said bond except by the payment of 10,000 dollars in legal tender currency.

11. That the payment of 10,000 dollars in legal tender currency is not adequate and complete performance of the defendant's obligation.

12. That defendant's said refusals were, as your petitioner is informed and verily believes, on the ground that the Joint Resolution of June 5, 1933, (48 Stat. 113), excused full performance of defendant's obligation.

13. That the Congress of the United States had no power to enact said Joint Resolution.

14. That the operation and effect of said Joint Resolution is to deprive your petitioner of his property without due process of law.

15. That said Joint Resolution is, therefore, unconstitutional and void.

16. That said Joint Resolution was repealed by the Gold Reserve Act of 1934, approved January 30, 1934.

17. That by reason of the circumstances aforesaid, your petitioner was damaged in the sum of $16,931.25, the value of defendant's obligation to petitioner, which sum is now due and owing by the United States to your petitioner, and no part of which has been paid.

18. That your petitioner is the sole owner of the claim herein made and the only person interested therein, and that there has been no assignment or transfer of this claim [fol. 5] or any interest therein, and your petitioner is justly entitled to recover the amount herein claimed from the Government of the United States after allowing all just credits and offsets.

19. That no action upon your petitioner's claim has been had by or before Congress or, except as aforesaid, any Executive Department of the Government.

20. That your petitioner is and at all times herein mentioned was a citizen of the United States; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

21. That the address of your petitioner is No. 70 Broadway, in the Borough of Manhattan, City, County and State of New York; that the address of the attorneys for your petitioner, Larkin, Rathbone & Perry, Esqs., is No. 70 Broadway, Borough of Manhattan, City, County and State of New York.

22. That the facts stated in this petition are true.

Wherefore, your petitioner asks that judgment may be entered in his favor against the United States for the sum of $16,931.25, with any interest due thereon.

To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the defendant.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the court finds it necessary for a proper disposition of the case that certain questions of law should be determined. They are as follows:

[fol. 6] QUESTIONS CERTIFIED

1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of$10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value," entitled

to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above questions and certify and transmit and refer the same to the Court of Claims of the United States for its guidance in the further progress of the case.

Fenton W. Booth, Chief Justice. Wm. R. Green, [fol. 7] Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard J. Whaley, Judge.

[fol. 8] I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of John M. Perry v. The United States, No. 42676, was duly filed and entered or (sic) record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 15th day of November, A. D. 1934.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal Court of Claims.)

[fol. 9] [Endorsed:] Court of Claims. No. 42676. John M. Perry v. The United States. Questions to be certified to the Supreme Court.

Endorsed on Cover: File No. 39,160. Court of Claims. Term No. 532. John M. Perry vs. The United States. Certificate. Filed November 16, 1934. File No. 532, O. T., 1934.

The face of claimant's Liberty Bond provides as follows:

4¼%	**Fourth Liberty Loan**
Gold Bond of 1933-1938	19831
$10,000	$10,000

THE UNITED STATES OF AMERICA

for value received promises to pay to

JOHN M. PERRY

or registered assigns the sum of

TEN THOUSAND
DOLLARS

On October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum, from April 15, 1920 on April 15 and October 15 in each year, until the principal hereof shall be payable, at the Treasury Department, Washington, or, at the holder's option, at any agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933-1938 authorized by an act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department circular No. 121, dated September 28, 1918, to which reference is hereby made for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed, at the pleasure of the United States on and after October 15, 1933, at par and accrued

interest, as in said circular provided. This bond does not bear the circulation privilege.
Washington, October 24, 1918.

Recorded: ..... Examined .....

WM. G. MCADOO,
Secretary of the Treasury.

(SEAL)

HOUSTON B. TEEHEE,
Register of the Treasury.

Transferable on the Books of the United States Treasury Department.

Treasury Department Circular No. 121, insofar as it is relevant, provides:

"1918
Department Circular No. 121
Loans and Currency

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, September 28, 1918.

The Secretary of the Treasury invites subscriptions, at par and accrued interest, from the people of the United States for $6,000,000,000 of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933-38, of an issue authorized by an act of Congress approved September 24, 1917, as amended by the acts of Congress approved April 4, 1918, and July 9, 1918, and supplemented by an act of Congress approved September 24, 1918, the right being reserved to allot additional bonds up to the full amount of any oversubscription.

DESCRIPTION OF BONDS.

DENOMINATIONS.

Bearer bonds with interest coupons attached will be issued in denominations of $50, $100, $500, $1,000, $5,000, and $10,000 Bonds registered as to principal and interest will be issued in denominations of $50, $100, $500, $1,000, $5,000, $10,000, $50,000, and $100,000. Provision will be made for the interchange of bonds of different denominations and of coupon and registered bonds and for the transfer of registered bonds, without charge by the United States, and under rules and regulations prescribed by the Secretary of the Treasury.

RATE OF INTEREST, DATE OF BONDS, MATURITY, AND REDEMPTION.

The bonds will be dated October 24, 1918, and will bear interest from that date at the rate of four and one-quarter per cent per annum, payable on April 15 and October 15 in each year. The interest payable on April 15, 1919, will be for 173 days. The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in

part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal and interest of the bonds are payable in United States gold coin of the present standard of value.

* * * *"

Treasury Department Circular No. 501, insofar as it is relevant, provides:

"PARTIAL REDEMPTION OF FOURTH LIBERTY LOAN BONDS BEFORE MATURITY

1933
Department Circular No. 501

Public Debt Service

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, October 12, 1933.

To Holders of Fourth Liberty Loan 4¼ per cent Bonds of 1933-38, and Others Concerned:

I. NOTICE OF CALL FOR PARTIAL REDEMPTION OF FOURTH LIBERTY LOAN 4¼ PERCENT BONDS OF 1933-38 (FOURTH 4¼'S) BEFORE MATURITY

1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ percent bonds of 1933-38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

• • • •

All outstanding registered bonds bearing serial numbers the final digit of which is 9, 0, or 1.

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934.

3. Fourth 4¼'s bearing serial numbers (and prefix letters) other than those designated are not included in or affected by this call for partial redemption.

• • • •

IV. RULES AND REGULATIONS GOVERNING REDEMPTION

Pursuant to the call for partial redemption, as set forth in Section I of this Circular, the following

rules and regulations are hereby prescribed to govern the surrender of Fourth 4¼'s called for redemption on April 15, 1934:

• • • •

5. *Presentation and surrender of registered bonds.*—Any Fourth 4¼'s in registered form, which are included in the call for partial redemption, must be assigned by the registered payees or assigns thereof, or by their duly constituted representatives, to 'The Secretary of the Treasury for redemption' in accordance with the general regulations of the Treasury Department governing assignments, and should thereafter be presented and surrendered to any Federal Reserve Bank or Branch, or to the Division of Loans and Currency, Treasury Department, Washington, D. C., for redemption on April 15, 1934. (NOTE.—IF TO BE PRESENTED FOR EXCHANGE UNDER TREASURY DEPARTMENT CIRCULAR NO. 502, FOLLOW INSTRUCTIONS GIVEN IN THAT CIRCULAR.) The bonds must be delivered at the expense and risk of holders, and should be accompanied by appropriate written advice (see Form P.D. 1364 attached hereto).

• • • •"

Act of September 24, 1917

(40 Stat. 288, amended, April 4, 1918, 40 Stat. 502; and July 9, 1918, 40 Stat. 844):

An Act To authorize an additional issue of bonds to meet expenditure for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend additional credit to foreign Governments, and for other purposes.

Sec. 1. The Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purpose of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law, not exceeding in the aggregate $20,000,000,000, and to issue therefor bonds of the United States, in addition to the $2,000,000,000 bonds already issued or offered for subscription under authority of the Act approved April twenty-fourth, nineteen hundred and seventeen, entitled "An Act to authorize an issue of bonds to meet expenditures, for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes": Provided, That of this sum $3,063,945,460 shall be in lieu of that amount of the unissued bonds authorized by sections one and four of the Act approved April twenty-fourth, nineteen hundred and seventeen, $225,000,000 shall be in lieu of that amount of the unissued bonds authorized by section thirty-nine of the Act approved August fifth, nineteen hundred and nine, $150,000,000 shall be in lieu of the unissued bonds authorized by the joint resolution approved March fourth, nineteen hundred and seventeen, and $100,000,000 shall be in lieu of the unissued bonds authorized by section four hundred of the Act approved March third, nineteen hundred and seventeen.

The bonds herein authorized shall be in such form or forms and denomination or denominations and subject to such terms and conditions of issue, conversion, redemption, maturities, payment and rate or rates of interest, not exceeding four and one-

quarter per centum per annum, and time or times of payment of interest as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value.

The bonds herein authorized shall from time to time first be offered at not less than par as a popular loan, under such regulations, prescribed by the Secretary of the Treasury from time to time, as will in his opinion give the people of the United States as nearly as may be an equal opportunity to participate therein, but he may make allotment in full upon application for smaller amounts of bonds in advance of any date which he may set for the closing of subscriptions and may reject or reduce allotments upon later applications and applications for larger amounts, and may reject or reduce allotments upon applications from incorporated banks and trust companies for their own account and make allotment in full or larger allotments to others, and may establish a graduated scale of allotments, and may from time to time adopt any or all of said methods, should any such action be deemed by him to be in the public interest: Provided, That such reduction or increase of allotments of such bonds shall be made under general rules to be prescribed by said Secretary and shall apply to all subscribers similarly situated. And any portion of the bonds so offered and not taken may be otherwise disposed of by the Secretary of the Treasury in such manner and at such price or prices, not less than par, as he may determine. The Secretary may make special arrangements for subscriptions at not less than par from persons in the military or naval forces of the United States, but any bonds issued to such persons shall be in all respects the same as other bonds of the same issue.

NOTE: This section was first amended by increasing the aggregate amount of the bond issue from $7,538,945,406, which was originally authorized, to $12,000,000,000, changing the interest rate from four per cent per annum to four and one-quarter per cent per annum, and adding the last sentence of the section relating to subscriptions from persons in the military or naval service, by the Third Liberty Bond Act of April 4, 1918, ch. 44, § 1.

As so amended it was again amended by striking out the figures "$12,000,000,000" and inserting in lieu thereof the figures $20,000,000,000 as given in the text, by the Fourth Liberty Bond Act of July 9, 1918, ch. 142, § 1.

THE ANNALIST WEEKLY INDEX OF WHOLESALE COMMODITY PRICES (1913=100)

(Unadjusted for Seasonal Variation)

1934.	In Terms of Current U. S. Dollars									All Comm.
	1. Farm Products.	2. Food Products.	3. Textile Products	4. Fuels.	5. Metals.	6. Building Materials.	7. Chemicals.	8. Miscellaneous.	All Commodities.	¶In Old Dollar.
Dec. 11	109.1	118.7	*107.6	161.2	109.6	112.1	99.0	77.5	117.4	69.9
Dec. 4	†108.8	118.3	†117.5	162.6	109.6	112.2	99.0	77.6	117.4	69.7
Nov. 27	107.6	117.0	106.5	162.6	109.6	112.4	99.0	77.8	116.5	69.3
Dec. 12,'33	83.0	101.8	117.8	137.0	105.2	111.8	98.5	84.8	103.8	67.2

*Preliminary. †Revised. ¶Based on exchange quotations for France, Switzerland, Holland and Belgium. Back figures: For weekly figures from April 26, 1927, to Sept. 4, 1934, see THE ANNALIST of June 22, 1934, page 963, and Sept. 7, 1934, page 351.

FILE COPY

JAN 8 1935

CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

CLAIMANT'S REPLY TO THE BRIEF FOR THE UNITED STATES.

JOHN M. PERRY,
Claimant.

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

No. 532.

JOHN M. PERRY

vs.

THE UNITED STATES.

ON CERTIFICATE FROM THE COURT OF CLAIMS.

CLAIMANT'S REPLY TO THE BRIEF FOR THE UNITED STATES.

The Government's brief in this cause has incorporated its brief in cases Nos. 471 and 472. It is not the purpose of this brief to attempt to refute in detail each and all of the arguments there set forth. Many of those arguments are either irrelevant or are contradicted by other arguments made by the Government itself. The propositions on which the Government relies to sustain its contentions in this cause consist mainly of a repetition of those set forth in its brief in cases Nos. 471 and 472 and are fully answered in the brief of the respondents in those cases. We accordingly refer to the respondents' briefs in cases Nos. 471 and 472. The intention is to clarify the issues presented herein and to answer those few arguments pertinent to this case which were not contained in the Government's brief in those cases.

Two causes of action over which the Court of Claims has jurisdiction are relied upon by the claimant to sustain his contention that the answer to each of the questions certified from the Court of Claims should be in the affirmative.

The first of these is for damages for breach of an express contract. The claimant's Liberty Bond provides for the payment of both principal and interest "in United States gold coin of the present standard of value". This "present standard of value" was first established by the Act of January 18, 1837 (5 Stat. 136) and has been reaffirmed by Congress (Act of March 14, 1900, 31 Stat. 45). The facts certified from the Court of Claims show that the United States has failed to perform this promise and this has not been denied by the Government. In its brief, the Government attempts to justify its breach of contract on the ground that performance has been excused by the Joint Resolution of June 5, 1933 (48 Stat. 113). The claimant asserts that this statute does not justify this breach of contract because, in so far as it purports to invalidate the gold clause in the claimant's Liberty Bond, it is unconstitutional and void in that it is not an exercise of any of the powers delegated to Congress and is a violation of the Fifth and Fourteenth Amendments to the Constitution.

The second cause of action relied upon by the claimant is that the Joint Resolution of June 5, 1933 (48 Stat. 113), in view of the disparity between paper currency and the gold standard established by law resulting from the refusal of the United States to redeem its currency obligations, taken together with the Act of May 12, 1933 (48 Stat. 31) as amended by the Gold Reserve Act of January 30, 1934 (48 Stat. 337, 340) and the Presidential Proclamation of January 31, 1934 reducing the standard of value at which the currency is stabilized, constitutes a taking of the claimant's property without just compensation.

Three other causes presenting issues to some extent analogous with those presented in this case have been set down for hearing at the same time. Two of these cases (Nos. 471 and 472) involve private obligations containing

gold clause provisions and do not involve, as does the instant case, the constitutionality of the attempted repudiation by the Government of its own obligations; nor do these cases involve a violation of the Fourteenth Amendment or a direct taking by the Government of property belonging to individuals. The remaining case (No. 531) is an action involving Treasury certificates, a form of currency, and no question of the power of Congress is there presented, but the issues therein are those of a denial of due process of law and of taking without just compensation. The Joint Resolution of June 5, 1933 specifically exempts currency, and its validity, therefore, is not material in case No. 531.

I.

The Meaning of the Gold Clause in the Claimant's Liberty Bond.

The claims of the parties are in direct conflict as to the meaning of the gold clause in the claimant's Liberty Bond. The claimant's position is that it must be considered a measure of the value of the obligation, while the Government purports to assert that it is merely a mode of payment. Thus, the issue upon which the claimant and the Government meet is whether or not the purpose of the gold clause provision was to protect the claimant from fluctuations in the value of currency in terms of gold or was merely a promise to pay in a particular kind of money. In other words, the Government contends, as indeed it must if its contentions are to be supported, that this provision does not serve to distinguish gold-clause from non-gold-clause obligations. The Government has attempted to establish this meaning and throughout its brief points out that no injury has been done to the claimant other than the indirect injury necessarily incident to inflationary measures, which is similarly inflicted upon the holders of obli-

gations providing in terms merely for the payment of lawful money. (See Government's brief in No. 532). Manifestly, if this major premise is false, the entire Government case falls, for no attempt has been made to defend its position if the true purpose of the insertion of the gold-clause provision was to protect the claimant from the depreciation of lawful money in terms of gold.

The claimant has shown in his brief, pages 10-16, and in fact the Government has admitted, that the "true import" of gold-clause provisions is to protect the creditor against the depreciation of currency in terms of gold (Government's Brief in Case No. 532, page 19; and in Cases Nos. 471 and 472 at page 115). In spite of this admission, the Government asserts that the gold clause in the claimant's Liberty Bond could not have been intended to have had this meaning, but that it was merely a continuation of a precedent established during the period when the monetary system of the United States was on a "dual standard", (Brief in Case No. 532, pages 8-17). An attempt is made to support this by a quotation from 45 Congressional Record, Part 2, page 1293, January 31, 1910. The Panama Canal Loan Act of August 5, 1909 (36 Stat. 117) had provided that the bonds issued thereunder should be payable "in United States gold coin", and at that time the Senate was considering a proposed amendment to the effect that "Any bonds and certificates of indebtedness of the United States issued after February 4, 1910, shall be payable, principal and interest, in United States gold coin of the standard of value on February 4, 1910; * * *". Senator Underwood, a Democrat, in response to Republican attack, said that the purpose of so providing was "because you (the Republicans) have established a precedent and we cannot get away from it". In this he was referring to the fact that the Act of March 18, 1869 (16 Stat. 1) and the Act of March 14, 1900 (31 Stat. 45), each of which inserted a gold clause in Government obligations, were enacted by Republican Congresses. The true purpose of this amendment to the Panama Canal Loan Act was stated almost immediately

afterward by Senator Payne, the proponent of the bill, appearing upon the same page of the Congressional Record as follows:

> "Now this bill provides for the payment of these bonds in gold. Why? For the benefit of the rich bondholder, according to the talk of my colleague? An adjective beginning with 'd' might properly describe that kind of talk. For the benefit of those people who buy the bonds, that they may give more money for them, and pay more money into the Treasury, and so contribute relief to the taxpayers of this country! That is the object of the bill."

The Government's contention that Congress did not realize the "true import" of the insertion of gold clauses is, of course, absurd. The Gold Standard Act of March 14, 1900 (31 Stat. 45), which finally abolished "the dual monetary system" in the United States, at the same time provided for the issue of Government obligations containing gold clause provisions; the Act of February 4, 1910 (36 Stat. 192) was enacted for the specific purpose of including such provisions in the Panama Canal Loan Act of August 5, 1909 (36 Stat. 117); and the Act of September 24, 1917 (40 Stat. 288) authorizing the issue of the claimant's Liberty Bond, similarly provided, although at that time all of the countries engaged in the World War had departed from the gold standard and the possibility that the United States would similarly be forced to abandon the gold standard was imminent.

The claimant does not, as the Government asserts (Brief in case No. 532, page 15), rely solely on the interpretation that the gold-clause provision was intended to provide for the payment of lawful money measured in terms of gold, but it relies as well upon any construction which may be reached, whether to that effect or to the effect that it is payable in a particular kind of coin or currency, as long as the clear intention of the parties is carried out. The claimant's use of the phrase "gold value" throughout

his Brief has been intended to express the clear intention that the claimant shall be protected against fluctuations of the value of lawful money in terms of gold.

II.

Section Four of the Fourteenth Amendment.

The claimant in his brief has effectively pointed out that section four of the Fourteenth Amendment protects his Liberty Bond from repudiation or payment of its face value in depreciated currency (Brief in case No. 532, pages 17-21). The Government takes the surprising position that it can repudiate any of the covenants and conditions contained in its public debt obligations, short of total repudiation, because this, as it claims, would not be questioning the *validity* of the public debt. (Brief in case No. 532, at pages 62, 65-67) This is plainly disregarding the legal meaning of the word "validity." A contract is valid when it is legally sufficient. The court in *Campbell* v. *Crampton* (2 Fed. 415), had occasion to consider the meaning of "validity", saying:

> "When the authorities which declare that the obligation, nature and validity of a contract, made in one place, which is to be performed in another, are to be determined by the law of the place of performance, are examined, it will be found that the term 'validity' refers to the conditions of the contract, and the extent and nature of its obligation, as to which the agreement will be upheld or defeated, according to the sanction or the prohibitions of the law of the place where the parties have located the transaction."

The Government further states that "the legislative history of section four likewise supports the view that the Congress intended the phrase to refer to a complete repudiation of the public debt". (Brief in case No. 532, page

62) That this statement is unfounded, and that, however meager may have been the discussion during the progress of the debate on section four of the proposed amendment, the underlying intention was to insure against scaling down of the national debt directly or indirectly by repudiating the promise to pay in gold coin, will appear from the following: On December 5, 1865, only some four months before the introduction of section four, on May 23, 1866, the following resolution was offered in the House by Samuel J. Randall and agreed to by a vote of 162 yeas, 1 nay:

> "Resolved that, as the sense of this House, the public debt created during the late rebellion was contracted upon the faith and honor of the nation; that it is sacred and *inviolate*, and must and ought to be paid, principal and interest; *that any attempt to repudiate or in any manner to impair or scale the debt* shall be universally discountenanced, and promptly rejected by Congress if proposed." (*W. A. Dunning, Political Hist. of the U. S. During Reconstruction* (1880) p. 109. Italics ours)

In the debate on the Howard amendment, on June 4, 1866 (see claimant's Brief, page 19; Government's Brief in case 532, pages 87, 88), Senator Hendricks speaking against the amendment said (Cong. Globe June 4, 1866, p. 2940):

> "The fourth section provides that the public debt shall remain inviolate. Who has asked us to change the Constitution for the benefit of the bondholders? Are they so much more meritorious than all other classes that they must be specially provided for in the Constitution? Or, indeed, do we distrust ourselves and fear that we will all become repudiators? A provision like this, I should think would excite distrust and cast a shade on public credit. But perhaps the real purpose is so to hedge in the bondholders by constitutional provision so that they never may be taxed . . . such would be the effect of this amendment. Who has attacked public credit, or questions the obligation to pay the public debt? Are the bondholders not receiving their interest, even in ad-

> vance, *and in gold?* Why do they ask this extraordinary guarantee?" (Italics ours)

Section four as amended by the Senate was passed in the House of Representatives on June 13, 1866.

Thaddeus Stevens, the protagonist of the Fourteenth Amendment, stated (Cong. Globe June 13, 1866, page 3148):

> "The fourth section, which renders *inviolable* the public debt and repudiates the rebel debt, will secure the approbation of all but traitors." (Italics ours)

The pending Fourteenth Amendment became one of the issues of the compaign for congressional elections in that year. The extraordinary procedure was adopted of holding national political conventions, usually held only in Presidential years. The subject of the *inviolability* of the national debt was specifically dealt with in several of the party platforms. (Cornell Law Quarterly, December 1933, p. 10.)

Thorp, in his *Constitutional History of the United States*, Vol. 3 (1901) p. 297, summing up public opinion, says:

> "The fourth section, on the validity of the national debt and the repudiation of the Confederate debt and of all claims for the loss of slaves, would not meet with opposition at the North. Public policy demanded the ratification of this clause.
>
> "The national debt, which at this time had reached its highest point, over two and three quarters billions of dollars, was held chiefly at the North and *its repudiation or diminution in value, or any distrust of its obligations,* would affect most disastrously the lives and fortunes of the Northern people and would injure our national credit abroad. Its *validity* was essential to our prosperity, however great the burden of payment might prove to be." (Italics ours.)

Ratification was still pending when the Presidential campaign opened in 1868. One of the chief issues of the campaign was the Fourteenth Amendment. The Democratic

platform demanded taxation of the government bonds and *their payment "in lawful money", that is, greenbacks,* (Cambridge Modern History, Vol. 7 (1907), pp. 631-633; *XIV Amendment, A Forgotten Section, Cornell Law Quar., Dec. 1933,* p. 11).

The Government points out the colloquy as to the meaning of section four, had between Mr. Johnson and Mr. Clark who offered the amendment of the Joint Committee on Reconstruction rejecting the language of section four found in the Howard Amendment, which limited it to the obligations of the United States incurred out of the Civil War. The language finally adopted is, "The validity of the public debt * * * shall not be questioned".

> "Mr. Johnson: I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the same.
> Mr. Clark: The result is the same."

The fact was that the language was entirely different from that of the Howard Amendment and removed any limitation confining the debt to that incurred during the Civil War. The result is the same in that it still covers the Civil War debt, but the removal of the limitation to that debt necessarily extends protection to all other public debt.

No statement to explain or excuse a member's vote can serve to change the actual meaning of words plainly used. A resolution first proposed as deeming a thing to be "white", which resolution as actually adopted declares it to be "black", cannot by construction change the meaning to "white", because a member in debate says he votes for "black" because it means the same as, and leaves unchanged, the original declaration and meaning of the rejected "white".

In its footnote to page 67 of its Brief in case No. 532, the Government states that: "Historians who have considered section four limit its concept of public debt to that public debt existing at the time of the adoption of the Amendment", citing numerous authorities. It is submitted that the references cited do not sustain that statement.

III.

No provision of the Constitution authorizes Congress to enact the Joint Resolution of June 5, 1933.

The Government in its attempt to justify the Joint Resolution of June 5, 1933, as an exercise of the delegated powers of Congress has made no attempt to support that statute in so far as it purports to destroy gold-clause provisions intended to protect creditors from the depreciation of currency in terms of gold, but solely attempts to establish the validity of that Resolution as applied to contracts providing for payment in a particular kind of money. The Government has not shown how contracts which were intended to protect creditors from depreciation of currency in terms of gold affect or "obstruct" any of the powers of Congress. The Government seeks to show that the great number of gold-clause obligations outstanding would make it a great hardship if it were required to perform them according to their tenor, but fails to point out that the number of these obligations outstanding has been reduced from some $21,000,000,000 on May 31, 1933, to approximately $12,000,000,000 at the present time. During the same period the public debt of the United States has risen some $7,000,000,000 to an all time high of approximately $28,500,000,000 by the issue of some $16,500,000,000 of non-gold-clause obligations. Through this entire period the interest rates on new borrowing have been the lowest ever obtained by the Government. The argument that the hardship of paying its obligations according to their tenor obstructs the borrowing power and so justifies their repudiation in whole or in part is clearly unwarranted.

The Government in its attempt to justify the Joint Resolution of June 5, 1933, as an exercise of the delegated powers of Congress has gone to great lengths in an attempt to establish that emergency measures were necessary to protect the gold reserves of the country and that the establishment of a gold bullion standard was the only way to

combat the monetary policies of foreign governments. We do not here contest the right of the government to do anything necessary to protect its gold reserves or for that matter the establishment of a gold bullion standard. The Joint Resolution was not, however, a temporary measure, but was an attempt to lay the foundation for the subsequent devaluation of the currency by a destruction of vested rights, to avoid the expense necessarily incident thereto. As has been stated in the claimant's brief the Presidential Proclamations and Orders requiring gold both coin and bullion to be deposited in the Treasury and the embargo placed on foreign shipments were clearly all that was required as a temporary measure. The Joint Resolution, in so far as it applied to obligations coming due in the future, had no real or necessary relation to these emergency measures and, even if the obligations came due during the period of the emergency, the gold reserves would be amply protected if these obligations had been paid according to their tenor and the gold returned to the Treasury pursuant to the Presidential Proclamations and Executive Orders.

Even if it were conceded that the Joint Resolution was a temporary measure designed to protect the gold reserves of the country during an emergency, clearly when as now those gold reserves are greater than ever before, the emergency has ceased and the justification for the Joint Resolution must be held to have ended. The Gold Reserve Act of January 30, 1934, establishing a permanent monetary policy provides that wherever reference is made therein "to *equivalents* as between dollars or currency of the United States and gold, one dollar or one dollar face amount of any currency of the United States *equals* such a number of grains of gold, nine-tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by this Act amended, twenty-five and eight-tenths grains of gold, nine-tenths fine, and thereafter such a number of

grains of gold, nine tenths fine, as the President shall have fixed under such authority." (Italics ours.) In other words, Congress has recognized that the new dollar is not the equivalent of the old dollar. The claimant's bond cannot be satisfied according to its tenor by the payment of its face amount in the depreciated currency. Even adopting the Government's construction that the gold-clause provides for the payment solely of gold coin, the only claim of justification for the enactment of the Joint Resolution urged by the Government is as a temporary emergency measure. If this is true, the intent of Congress in enacting permanent monetary legislation on January 30, 1934, must have been to repeal all temporary measures and the Joint Resolution must be considered to be inapplicable in the present case.

IV.

The Joint Resolution of June 5, 1933, is unreasonable, arbitrary and capricious, and is a violation of the Fifth Amendment to the Constitution.

The Government argues that the Joint Resolution of June 5, 1933, does not violate the Fifth Amendment, but here, as in the other parts of the brief, no attempt is made to support this Resolution as a repudiation of a specific provision, inserted in the claimant's Liberty Bond, intended to protect him against the depreciation of currency in terms of gold. The Government again resorts solely to the "gold coin" interpretation of the gold clause and attempts to support its discussion under the principles established by the *Legal Tender Cases*. Far from holding that Congress could repudiate contracts payable in money, what the Court actually decided was that the particular exercise of the borrowing and coinage powers in aid of each other was not unreasonable, arbitrary and capricious because it incidently injured creditors of simple money obligations. (This Court there recognized the injury re-

sulting from payment of any obligation in depreciated currency.) This Court clearly did not decide that Congress has power to repudiate or even to lessen all obligations for the payment of money. By providing that the claimant's Liberty Bond was payable "in United States gold coin of the present standard of value", Congress attempted thereby to remove even the possibility of incidental injury resulting from the depreciation of currency. The Joint Resolution of June 5, 1933, is an attempt to remove this protection and to subject the claimant to the injury which the holders of non-gold-clause obligations would suffer through devaluation, and which would only be permitted to occur because it was indirect and incidental. The Government's argument is that, because an injury to holders of obligations without gold clauses caused in the exercise of a paramount power was held not to cause that particular legislation to violate the Fifth Amendment, Congress must also have the power directly to remove the protection it has granted and cause the holders of gold clause obligations of the United States similarly to be injured. The distinction between the existence of such a power directly to destroy a vested right and the incidental causing of an injury through the exercise of a delegated power, as was held permissible in the *Legal Tender Cases,* would seem to be obvious.

The Government relies upon *Horowitz* v. *United States,* 267 U. S. 458, as authority for the proposition that the claimant has no right of recovery in the present case. The purpose of the embargo on shipments of freight made by the United States Railroad Administration was not to repudiate its contract with Horowitz, but was to facilitate shipments of war supplies. We do not question the propriety of the holding in that case that the injury there caused was incidental and, therefore, irremediable. The admitted purpose of the Joint Resolution of June 5, 1933, was to repudiate a specific provision in Governmental obligations containing gold clause provisions which were designed to protect the creditors of the Government from

the incidental injury resulting through depreciation in the value of currency. The case of *Lynch* v. *United States,* 292 U. S. 571, is clear authority for the well established proposition that the Federal Government may not directly abrogate its contractual obligations. See also, *United States* v. *Northern Pacific RR. Co.,* 256 U. S. 5, 64; *Choate* v. *Trapp,* 224 U. S. 665, 678; *United States* v. *Central Pacific Ry. Co.,* 118 U. S. 235, 238; *Sinking Fund Cases,* 99 U. S. 700, 718, 719, 759, 760.

On page 48 of the Government's Brief in case No. 532, it is asserted that, if claimant fail to prove that gold clause obligations were at a premium in terms of the coins and currency of the United States in circulation at that time, his entire argument fails, and it continues to assert that the fact that there was in the foreign exchange market a disparity between the "old gold dollar" and the other coins and currency then in circulation in the United States, is irrelevant. It is well established, however, that the Government may not, by limiting the market, prevent the owner of property from receiving its true value. Thus, it has been held that the prices prevailing in a market which is not free are not a measure of just compensation.

> *National City Bank* v. *United States,* 275 Fed. 885, 860, aff'd. 281 Fed. 754;
> *Vogelstein* v. *United States,* 262 U. S. 337, 339;
> *Dexter & Carpenter* v. *Davis,* 281 Fed. 385.

In the *Dexter* case there was a specific holding that the mine price fixed by orders of the United States Fuel Administrator during the War was not the true measure of value.

This principle has been recognized by the United States itself within the past year. In Executive Order No. 6261 issued under the Trading with the Enemy Act of October 6, 1917, as amended by Section 2 of the Act of March 9, 1933 (48 Stat. 2-5) and signed by the President on August 29, 1933 (set forth at page 49 of the Appendix to the

brief for the Government in case No. 532), the Secretary of the Treasury was authorized to receive on consignment gold recovered from natural deposits in the United States for sale to persons licensed to acquire gold for use in the arts, industries or professions or on foreign markets. This order specifically provided that: "Such sales shall be made at a price which the Secretary shall determine to be equal to the best price obtainable in the free gold markets of the world after taking into consideration any incidental expenses, such as shipping costs and insurance." It was clearly established, therefore, that the value of gold in the United States was equivalent to the value of gold in the free markets of the world. Purchasers of gold in the United States were required to pay the world price and persons holding gold recovered from natural deposits were entitled to receive that price. We do not understand how the creditors of the United States could lawfully be placed in a less favorable position.

However, even if it were true, as it is not, that resort could not be had to the nearest free market to determine the value of the claimant's Liberty Bond, nevertheless the claimant's case does not fall because he fails to prove that there was a disparity on June 5, 1933, between the value of obligations containing gold clause provisions and those which did not. All provisions of contracts are within the protection of the Fifth Amendment which prevents their unreasonable, arbitrary or capricious destruction within the meaning of the due process clause, whether or not they may be demonstrated to have a measurable worth. A provision which may only have effect on the happening of some particular contingency, is as free from arbitrary destruction as a provision then having operative effect. (The gold clause provision in the claimant's Liberty Bond, although dormant until May 12, 1933, became of utmost importance on that date, when the possibility of the devaluation of currency, against which it was designed to protect the claimant, became imminent.)

On page 46 of its brief in this cause, the Government argues that the Court of Claims may only consider causes of action for the taking of property without just compensation, but asserts that no cause of action within the jurisdiction of the Court of Claims arises from the destruction of property. This argument is reiterated in several places in Point V of its brief, page 68 *et seq.* This has led the Government mistakenly to conclude that the Court of Claims has no jurisdiction to consider the question whether the particular statute is unconstitutional because it is unreasonable, arbitrary and capricious and is, therefore, a violation of the due process clause of the Fifth Amendment. The claimant herein has asserted two specific causes of action, each of which is within the jurisdiction of the Court of Claims under Section 145 of the Judicial Code. The first of these is for damages for breach of contract. There is no doubt that the Government has refused to redeem the claimant's Liberty Bond according to its tenor, and in this action has set up the Joint Resolution of June 5, 1933, as a justification for its refusal. The claimant has asserted that this statute is unconstitutional and void and is, therefore, a nullity. One of the specific grounds that the claimant has relied on is that this Joint Resolution is a violation of the due process clause of the Fifth Amendment. The claimant does not, as the Government asserts, attempt to maintain an action against the United States on the ground that his property has been destroyed. His action is for breach of contract.

V.

The claimant, even though the Joint Resolution of June 5, 1933, is constitutional, is entitled to recover just compensation for the taking of his property for public use.

The Government in its brief argues that there has been no taking of the claimant's property and therefore claims that he is entitled to no compensation. The cases which are cited to support this proposition are those which concern incidental destruction of property but do not involve the direct repudiation of a contract entered into by the United States. A contract between the Government and a private person can no more effectively be taken than by its direct repudiation and refusal to perform in accordance with its terms (Brief, page 42). It is well established, when the Government takes private property for public use, that just compensation must be paid. This clearly would be applicable if the Government sought to take gold possessed by individuals without remuneration or without paying its true worth. How a distinction can be made between different kinds of property is difficult to understand and the claimant's contract calling for satisfaction "in United States gold coin of the present standard of value" is as sacred a property right as would be the ownership of gold coin.

Congress itself by the Gold Reserve Act of January 30, 1934, stated that after devaluation the value of such property would be increased in terms of money. Thus in Section 7, it is provided that, "In the event that the weight of the gold dollar shall at any time be reduced, the resulting increase in value of the gold held by the United States (including the gold held as security for gold certificates and as a Reserve for any United States notes and for Treasury notes of 1890) shall be covered into the Treasury as a miscellaneous receipt; * * * ". Section 10(b) appropriates out of such profits the sum of $2,000,000,000 for deposit with the Secretary of the Treasury for use as a stabilization

fund. This profit accrued to the Government from its taking of gold and has been officially estimated at $2,800,000,000 by Secretary Morganthau, in his radio address on August 28, 1934, (See The New York Times August 29, 1934, page 29) as follows:

> "But we have another cash drawer in the Treasury in addition to the drawer which carries our working balance. This second drawer I will call the gold drawer. In it is the very large sum of $2,800,000,000 representing 'profits' resulting from the change in the gold content of the dollar. Practically all of this 'profit' the Treasury holds in the form of gold and silver. The rest is in other assets."

This is, of course, the only profit shown on the books of the Treasury, while the attempted reduction of the public debt by the Joint Resolution of June 5, 1933, made effective by the Proclamation of January 31, 1934, amounts to over $14,700,000,000. (The amount of additional legal tender currency required to satisfy the outstanding gold clause obligations of the Government at the present time would be approximately $8,000,000,000.)

Congress has further indicated the inequity of its retention of such a profit by providing that the Philippine Government, which had maintained the major portion of the currency reserve of its monetary system in banks of this country, should be given credit for the increase in the value of this gold on the books of the Treasury and by this action recognized that it would be inequitable to retain the difference in value between the deposits made by that Government and the face amount in devalued currency, (Act of June 19, 1934, Seventy-third Congress, Public No. 419, c. 655, sec. 3530). The Philippine Government had received in return for its deposits the promise of the Government of the United States that they would be repaid. The Federal Government has specifically promised to pay the claimant a sum of money and to protect him against the devaluation of the currency. How the promise of the United States to the Philippine

Government may be considered to be more sacred than the promise of the United States to one of its citizens who is protected by the Constitution is difficult to comprehend.

Nor would the fact that claimant might be unable to show that there was a disparity on June 5, 1933, between gold-clause and non-gold-clause obligations prevent his recovery of just compensation for the taking of his property, as is apparently claimed by the Government (Brief in case No. 532, page 70). It will be noted that on June 5, 1933, and at all times until January 30, 1934, it was within the power of the Government of the United States to pay the claimant's Liberty Bond according to its tenor in either 10,000 gold dollars each containing 25.8 grains of gold .9 fine, or in an amount of legal tender currency measured thereby. The Joint Resolution, while providing that gold-clause obligations might be satisfied by the payment of legal tender currency, did not declare that these obligations must be paid in such currency. Therefore, until January 30, 1934, when the Gold Reserve Act was adopted there was no definite possibility that the United States would break or would attempt to break its contract by failing to pay in accordance with its literal terms. That statute provided that "No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States; * * *". By this provision, therefore, the possibility that literal compliance with the obligation of the claimant's bond would not be made became imminent. That date, therefore, would be the earliest upon which the claimant would be entitled to assert a taking of his property. The claimant's bond on that date had not, however, matured and it is believed that after April 15, 1934, the date fixed for redemption, and on May 24, 1934, when the Government actually refused to pay the true value of its obligation, is the date upon which the claimant's right to just compensation should be measured.

Even if the date of the taking of the claimant's property is to be considered as June 5, 1933, it is clear that the "just compensation" to which the claimant is entitled is

a judicial question and that the value of his property (i. e. the gold or gold coin to which he is entitled) can only be determined in the nearest free market. See pages 14-15, *supra* and *National City Bank* v. *United States,* 275 Fed. 885, 860 aff'd. 281 Fed. 754; *Vogelstein* v. *United States,* 262 U. S. 337, 339; *Dexter & Carpenter* v. *Davis,* 281 Fed. 385.

The Federal Government itself has conceded that the currency dollar, redemption of which was suspended in March, 1933, was of less real worth than the gold dollar containing 25.8 grains of gold .9 fine, by permitting the owners of gold from natural deposits in this country to sell and requiring purchasers of gold for use in the arts, industries or professions to pay, the world price in terms of currency dollars. (Executive Order No. 6261, August 29, 1933.) This was even before the order of the Secretary of the Treasury requiring the delivery of gold coin to the Treasury Department which was issued December 28, 1933, which was the first order properly issued. Even under this order it has been held that the Federal Government has no right to require the delivery of gold without payment of just compensation. (Opinion of Judge Brewster, *U. S.* v. *Spiegel,* Federal District Court, Mass., reported in *The New York Times,* Saturday, January 5, 1935, at page 25, column 8.

VI.

The Government's claim that the Joint Resolution impliedly withdraws its consent to be sued.

This claim (Brief in case No. 532, pp. 80-83) is clearly untenable, the Government's position being that the Joint Resolution, by implication at least, withdraws the consent to be sued by impliedly forbidding suit on gold clauses because they are not recognized as matter of public policy. The Government asserts that *Lynch* v. *United States* (292

U. S. 571, 582, 585-587), declares "that a mere withdrawal of the consent to sue on a contract would not imply repudiation". However, the Joint Resolution did not purport to deal with procedural matters and is sought to be justified as an exercise of the currency power. The *Lynch* case is a ruling to the contrary of the Government's claim, for that case decides that a provision directly worded to abrogate a governmental contract will not, in the absence of words showing the intent to withdraw the consent, be construed to be a repeal of the consent to be sued. As in the case at bar, the Statute aimed at the "right" and not at the "remedy". (See 292 U. S. 571, at 585-587)

CONCLUSION.

The claimant has shown that if the Joint Resolution of June 5, 1933, is sustained, it must be on the theory that Congress has the power to regulate and fix the value of all property, not indirectly through the increase or decrease in the value of currency, but by direct legislation. If this theory is established, the Congress, like the Parliament of Great Britain, will be held to be endowed with unlimited legislative authority. Blackstone has stated that the British Parliament has power "to do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament". (*Commentaries,* 4th Institute, page 36, quoted by Dicey, *Introduction to the Study of the Law of the Constitution,* 8th Ed. p. 40.) It may be that our constitution should have conferred the same omnipotence on the Congress, but this was not done. The Government's contention is that in an emergency, the authority of Congress becomes unlimited to deal with economic affairs through an extension of the currency power. (Brief in case No. 532, pages 17-45.) This Court answered

this argument seventy years ago when it stated in *Ex parte Milligan* (4 Wall. 1, 120, 121), that the framers of the Constitution

> "foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."

The claimant submits that both questions certified to this Court by the Court of Claims should be answered in the affirmative.

Respectfully submitted,

JOHN M. PERRY,
Claimant.

Of Counsel:

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HERSEY EGGINTON,
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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 532

JOHN M. PERRY

vs.

UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

COPY OF DOCUMENT READ BY CLAIMANT ON ORAL ARGUMENT IN SUPPORT OF STATEMENT FOUND AT PAGE 18 OF CLAIMANT'S REPLY BRIEF.

JOHN M. PERRY,
Claimant.

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Secretary Morganthau's Radio Address on New Deal Cost and Finances, *N. Y. Times, Aug. 29, 1934,* page 1, column 8, page 29, columns 7-8 (Text at page 29, columns 2-6)

(New York Times August 29, 1934, page 1, columns 7-8)

"Treasury to use profit of $2,800,000,000 on Gold in balancing the budget

Morganthau Tells Plan

Money will be locked in Stabilization Fund till Time to Cut Debt.

"But we have another cash drawer in the Treasury, in addition to the drawer which carries our working balance. This second drawer I will call the 'gold' drawer. In it is the very large sum of $2,800,000,000 representing 'profits' resulting from the change in the gold content of the dollar. Practically all of this 'profit' the Treasury holds in the form of gold and silver. The rest is in other assets."

"I do not propose here to subtract this $2,800,000,000 from the net increase of $4,400,000,000 in the national debt—thereby reducing the figure to $1,600,000,000. And the reason why I do not subtract it is this: for the present this $2,800,000,000 is under lock and key. Most of it by authority of Congress is segregaated in the so-called stabilization fund, and for the present we propose to keep it there. But I call your attention to the fact that ultimately we expect this 'profit' to flow back into the stream of our other revenues and thereby reduce the national debt."

"Two cash drawers in Use

"We have then, in effect, two cash drawers in the treasury—one containing our working balance, which is $1,600,000,000 larger than on March 4 of last year, and the other containing $2,800,000,000, *representing the 'profit' on devaluation."* (Times, Aug. 29, page 29, column 3.)

73rd Congress Session II Statutes p. 1115
June 19, 1934, Public No. 419 (S 3530) Chapter 655

An Act Relating to Philippine Currency reserves on deposit in the United States.

Be it Enacted etc. "That the Secretary of the Treasury is authorized and directed when the funds therefor are made available to establish on the books of the Treasury a credit in favor of the Treasury of the Philippine Islands for $23,862,750.78 being an amount equal to the increase in value (resulting from the reduction of the weight of the gold dollar) of the gold equivalent at the opening of business on January 31, 1934, of the balances maintained at

that time in banks in the Continental United States by the Government of the Philippine Islands for its gold standard fund, and its Treasury Certificate fund less the interest received by it on such balances.

Section 2. There is hereby authorized to be appropriated, out of the receipts covered into the Treasury under Section 7 of the Gold Reserve Act of 1934, by virtue of the reduction of the weight of the gold dollar by the Proclamation of the President on January 31, 1934, the amount necessary to establish the credit provided for in Section 1 of this Act.

Approved June 19, 1934.

JOHN M. PERRY,
Claimant.

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

v.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims has rendered no opinion.

JURISDICTION

The certificate of the Court of Claims was filed November 16, 1934. The jurisdiction of this Court rests on Section 3 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939.

QUESTIONS PRESENTED

The questions certified by the Court of Claims are as follows:

"1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United

States, of the principal amount of $10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

"2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933–1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

STATUTES AND ORDERS INVOLVED

The pertinent statutes and orders involved are set forth in the Appendix under separate cover.

STATEMENT

The bond held by the claimant, a citizen of the United States, is one of the series of Fourth Liberty Loan "4¼% Gold Bonds" of 1933–1938, in the principal amount of $10,000 payable on October 15, 1938, or at any time after October 15, 1933, at the option of the defendant (Ctf. 1). The text of the bond contains the provision: "The principal and interest hereof are payable in United States gold coin of the present standard of

value." The series was authorized by the Second Liberty Bond Act, approved September 24, 1917 (40 Stat. 288), as amended, which provided that the "principal and interest" of the bonds issued thereunder should be "payable in United States gold coin of the present standard of value." The bonds were issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, in which the Secretary of the Treasury stated that he invited "subscriptions, at par and accrued interest, from the people of the United States for six billion dollars of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933–1938" (Ctf. 2).

In accordance with the privilege of redemption set forth in said circular and in the authorizing statute, the Secretary of the Treasury by Treasury Department Circular No. 501, dated October 12, 1933, called the bond of the claimant, among others, for redemption on April 15, 1934 (Ctf. 2). On May 23, 1934, the claimant presented his bond to the defendant and demanded redemption by payment of 10,000 gold dollars, each containing 25.8 grains of gold 0.9 fine (Ctf. 2, 3). The defendant refused to comply with the claimant's demand for payment in gold dollars of such weight and fineness, whereupon the claimant demanded 258,000 grains of gold 0.9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars, each containing $15\frac{5}{21}$ grains of gold 0.9 fine, or 16,931.25 dollars in legal-tender currency (Ctf. 3). The defend-

ant also refused to accede to any of these demands, but offered payment of $10,000 in legal tender money (Ctf. 3).

On June 22, 1934, a petition was filed in the Court of Claims claiming damages in the sum of $16,931.25. The Government demurred to the petition on the ground that no cause of action had been stated (Ctf. 4).

The Court of Claims requesting appropriate instructions from this Court certified the two questions quoted above on November 16, 1934.

As the argument contained in the Government brief in *United States* v. *Bankers Trust Co.* (No. 471 and No. 472) is equally applicable to this case, that brief is hereby adopted as part of this brief. The discussion herein contained will be devoted to additional considerations not treated in the companion brief.

SUMMARY OF ARGUMENT

Public Resolution No. 10 of the 73rd Congress, approved June 5, 1933, declares that gold clauses are contrary to public policy and provides that obligations payable in money of the United States, whether or not such clauses are contained therein, shall be discharged by payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. As used in the Resolution "obligations" includes "every obligation of and to the United States" payable in money of the United States. The Reso-

lution is constitutional and is controlling in the case at bar.

There were compelling reasons for the recognition and declaration by the Congress that gold clauses are contrary to public policy. Whatever justification may have existed for such clauses under the dual monetary system which prevailed during and following the Civil War, and which entailed the circulation of two kinds of money at differing values and receivable for different payments, the justification was ended by our departure from that system. Gold clauses are inconsistent with the present policy of the Congress to maintain at all times the equal power of every dollar in the markets and in the payment of debts and to accord equal legal tender qualities to all forms of money in the payment of governmental and other kinds of debts.

The authorization of gold clauses by the Congress in 1917 which could not have foreseen the post-war monetary and economic developments does not render unreasonable the Congressional determination in 1933 that such clauses are against public policy.

The recent emergency has shown that gold clauses constitute a serious obstruction to the effective exercise by the Congress of its monetary and other powers. Their effect, if enforced, is of such serious consequence as substantially to deprive the Congress of the power to regulate the value of the dollar. Gold clauses would, if enforced, interfere with recent monetary measures

adopted to protect the gold reserves of the United States, to provide a more effective use of those reserves, and to regulate and protect the interstate and foreign commerce of the United States. These monetary measures were necessary, in the judgment of the Congress, to cope with the disorganized financial and economic conditions which arose out of the World War and reached their crisis in the United States in 1933. Only by declaring that gold clauses should not be enforceable in public as well as private obligations was the Congress able to take the steps required to meet these conditions.

The recent monetary legislation, of which the Joint Resolution is the keystone, was clearly embraced within the delegated and sovereign powers of the Congress. Substantially similar measures have frequently been taken in the past, pursuant to the powers to coin money and regulate the value thereof; to assure, in accordance therewith, a uniform value to the coins and currency of the United States; to borrow money on the credit of the United States; and to regulate foreign and interstate commerce and exercise a measure of control over international relations.

Objections under the due-process clause, if applicable to the present proceedings, are answered by the fact that the Resolution was an appropriate

and, in the judgment of an impressive majority of the Congress, a necessary means of assuring the effective exercise by the Congress of its delegated and sovereign powers.

The Joint Resolution does not question the validity of the public debt and does not violate Section 4 of the Fourteenth Amendment.

The Congressional determination respecting the money which may be tendered for debts (whether or not gold clauses have been included with respect thereto) can be applied to public as well as private debts, without in any sense questioning the validity of the debt.

Objections under the just-compensation clause of the Fifth Amendment, if applicable to the present proceedings, are answered by the fact that there has been no "taking"; and even if it could be said that there was a taking, provision for just compensation was made.

The Resolution is controlling in the case at bar. It is well established that the United States as defendant in the Court of Claims, may plead in defense, general legislation enacted by the United States in its sovereign capacity for the public good.

The effect of Section 1 of the Joint Resolution of June 5, 1933, is to withdraw the consent of the United States to be sued on gold clauses. Such a withdrawal is constitutional.

ARGUMENT

I

PUBLIC RESOLUTION NO. 10, APPROVED JUNE 5, 1933, IS CONSTITUTIONAL AND CONTROLLING IN THE CASE AT BAR

1. The gold clause

A. In General

The phrase "gold clause" is used to refer to a number of provisions calling for a particular kind of payment. The chief types are three in number and have appeared in both public and private obligations. The first and earliest type, common in the middle of the last century, calling for payment in coin [1] of no defined weight or fineness, is represented by the statutory provisions authorizing certain obligations issued by the Government during the Civil War.[2] Another type of clause, more accurately described as a "gold-value clause",[3] provides for payment in gold coin, or, as an

[1] In the earlier obligations, the provision was for "coin", but certain later issues expressly provide for gold coin. Of the latter type are the bonds issued under the Act approved June 28, 1902, 32 Stat. 481, 484. So also was a private bond under consideration in *Kennedy* v. *Conrad* (Colo.) unreported but quoted in 78 Cong. Rec. 5953, 5955.

[2] Act approved March 3, 1863, c. 73, 12 Stat. 709; Act approved March 3, 1864, 13 Stat. 13.

[3] Bulletin No. 27, Special Bulletin No. 4, Institute of International Finance, August 4, 1929, Madden and Nadler, "Gold Clause", page 3; Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Journal, 53, 55.

alternative, in an amount in money measured thereby. A coin provision of this general type was made applicable to the bonds of the United States by an Act approved March 18, 1869,[4] which pledged the faith of the United States to payment in "coin or its equivalent" of certain of the obligations of the United States. It will be noted, however, that this statute provides for payment in any coin[5] with-

[4] C. 1, 16 Stat. 1. The language is as follows: "* * * the faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver. But none of said interest-bearing obligations not already due shall be redeemed or paid before maturity unless at such time United States notes shall be convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin. * * *"

[5] See Senate Concurrent Resolution, adopted by the 45th Congress, 2d Session, in the Senate on January 25, 1878, and concurred in by the House on January 28, 1878, which provided as follows: "That all the bonds of the United States issued, or authorized to be issued, under the said acts of Congress hereinbefore recited are payable, principal and interest, at the option of the Government of the United States, in silver dollars, of the coinage of the United States, containing 412½ grains each of standard silver; and that to restore to its coinage such silver coins as a legal tender in payment of said bonds, principal and interest, is not in violation of the public faith, nor in derogation of the rights of the public creditor." See also 15 Op. A. G. 233 (1877).

out limitation as to the weight or fineness thereof. Subsequent Congresses have not followed the precedent of an alternative payment in coin value suggested by the 1869 statute, but in recent years have inserted into the obligations of the United States a gold-coin clause containing no words of equivalence. This, the third and most common type of clause in outstanding obligations, both public and private, calling for payment in gold coin of a particular standard of value, is that found in the bond of the claimant and in all other bonds issued by the United States between September 24, 1917, and June 5, 1933. In private obligations the clause generally assumes the form of a promise to pay in gold coin of the standard "of weight and fineness" of the date of issue, while in Federal obligations the phrase is gold coin of "the present standard of value."

The inclusion of the phrase "of the present standard of value" in the bond of the claimant appears to have been the result of the following of an inapplicable precedent. The phrase seems to have been used with respect to Federal obligations for the first time in the Refunding Act, approved July 14, 1870.[6] There is but one reference to the phrase in the entire Congressional discussion of that bill, and that indicates a desire to encourage

[6] 16 Stat. 272. The phrase was "coin of the present standard value."

subscriptions for the bonds abroad.[7] The claimant's bond, like every security of the United States outstanding on June 5, 1933,[8] forms part of

[7] Statement of Congressman Butler, of Massachusetts, 93 Cong. Globe, p. 5019. See also Report of the Secretary of the Treasury for the year 1869, p. XVII, and a Treasury Circular dated February 28, 1871, seeking subscriptions for bonds which tentatively reserved one-half of the ten-year 5% issue for foreign subscribers. The discussion in the Congress was as to the best method of encouraging foreign subscriptions to the bonds by fixing the most acceptable method of payment and was distinct from the question as to whether the bonds should be expressed to be payable in "coin" or in "lawful money."

[8] The Panama Canal Loan 2's 1916–1936, Panama Canal Loan 2's 1918–1938, Panama Canal Loan 3's 1961, were offered "to the public", by Treasury Department Circulars No. 62 dated July 2, 1906, No. 73 dated November 18, 1908, and No. 31 dated May 16, 1911, respectively. The First Liberty Loan 3½% bonds, the Second Liberty Loan 4% bonds, the Third Liberty Loan 4¼% bonds, and the Fourth Liberty Loan 4¼% bonds were offered to "the people of the United States" by Treasury Department Circulars No. 78 dated May 14, 1917, No. 90 dated October 1, 1917, No. 111 dated April 6, 1918, and No. 121 dated September 28, 1918. Subscriptions were invited to Treasury Bonds of the Series of 1947–1952, 1944–1954, 1946–1956, 1943–1947, 1940–1943, 1941–1943, 1946–1949, 1951–1955, 1941, 1943–1945, 1944–1946, and 1946–1948, and Victory Notes to "the people of the United States" by Treasury Department Circulars No. 307 dated October 9, 1922, No. 349 dated December 3, 1924, No. 367 dated March 8, 1926, No. 383 dated May 31, 1927, No. 405 dated July 5, 1928, No. 433 dated March 2, 1931, No. 438 dated June 1, 1931, No. 443 dated August 1, 1931, No. 490 dated July 31, 1933, No. 502 dated October 12, 1933, No. 508 dated April 4, 1934, No. 512 dated June 4, 1934, and No. 138 dated April 21, 1919, respectively. All Treasury notes, bills, and certificates of indebtedness outstanding on June 5, 1933, were offered through the Federal Reserve banks.

a domestic issue.[9] None of the outstanding gold-clause obligations of the United States was offered especially to nonresident aliens. The Congressional debates in 1917 do not indicate that consideration was given to the inclusion of the present-standard-of-value clause in the Liberty Bond bill. In the interval between the Refunding Act of 1870 and the Libery Bond Acts, certain laws had included the present-standard-of-value gold clause, while others omitted it. Committee reports and legislative debates fail to reveal why the provisions should have been included in some acts and excluded from others.[10]

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[9] See Treasury Department Circular No. 121, dated September 28, 1918.

[10] It was not included in the Act of June 13, 1898 (30 Stat. 448, 467), authorizing the Spanish War bonds, or those of June 28, 1902 (32 Stat. 484), and August 5, 1909 (36 Stat. 117), authorizing the Panama Canal bonds; but it was included in the Act of March 14, 1900 (c. 41, 31 Stat. 45), authorizing the 2% consols, and in the Act of June 25, 1910 (36 Stat. 817), authorizing the issue of postal savings bonds. The last discussion in Congress respecting a gold clause containing such a phrase appears in the debates of the Act approved February 4, 1910 (c. 25, 36 Stat. 192) (amending the Panama Canal Bond Act of 1909), when Senator Underwood, on being asked the reason for the introduction into that bill of the present-standard-of-value gold clause, responded: "Because you [the opposing party] have established a precedent and we cannot get away from it." 45 Cong. Rec., part 2, page 1293, January 31, 1910. See also the statement of Senator Wolcott made at the time of the passage of the Act of March 14, 1900, attributing the whole gold clause to a fad, 33 Cong. Rec., Part II, page 1713.

The gold clause introduces an important problem due to the overwhelming amount of obligations calling for payment in gold coin of the old standard outstanding at the time of the passage of the Joint Resolution of June 5, 1933. The estimated amount of public interest-bearing gold clause obligations outstanding on that date reaches the figure of $25,000,000,000, including approximately $20,000,000,000 of Federal obligations.[11]

The typical clause calls for payment of interest as well as principal in gold coin. With over $20,000,000,000 principal amount of Federal interest-bearing obligations outstanding[12] on May 31, 1933, on which the average interest charge is 3½ percent, the annual interest payable in gold coin of the old standard in respect of such obligations is $700,000,000. The annual interest payable in gold coin upon the estimated $75,000,000,000 principal amount of private obligations would amount to $3,750,000,000 at an assumed annual interest rate of 5 percent.

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[11] See pages 16 to 18 and 50 of brief in cases No. 471 and No. 472.

[12] The unmatured United States interest-bearing obligations outstanding on May 31, 1933, consisted of the following:

Bonds:		
2% Consols of 1930	$509,724,050.00	
2% Panama Canal Loan of 1916–36	48,954,180.00	
2% Panama Canal Loan of 1918–38	25,947,400.00	
3% Panama Canal Loan of 1961	49,800,000.00	
3% Conversion Bonds of 1946–47	28,894,500.00	
2½% Postal Savings Bonds (5th to 44th Series)	52,697,440.00	
		$806,017,570.00

(Footnote continued on p. 14.)

B. The Gold Clause in Claimant's Bond

The Joint Resolution applies to gold clauses of the three types described above. The gold clause in claimant's bond is of the third type, calling

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[12] Footnote continued from page 13.

Bonds—Continued.			
First Liberty Loan			
3½% Bonds of 1932-47	$1,392,227,350.00		
Converted 4% Bonds of 1932-47	5,002,450.00		
Converted 4¼% Bonds of 1932-47	532,490,450.00		
Second Converted 4¼% Bonds of 1932-47	3,492,150.00		
		$1,933,212,400.00	
Fourth Liberty Loan—			
4¼% Bonds of 1933-38		6,268,095,250.00	
			$8,201,307,650.00
Treasury Bonds—			
4¼% Bonds of 1947-52		758,983,300.00	
4% Bonds of 1944-54		1,036,834,500.00	
3¾% Bonds of 1946-56		489,087,100.00	
3⅜% Bonds of 1943-47		454,135,200.00	
3⅜% Bonds of 1940-43		352,994,450.00	
3⅜% Bonds of 1941-43		544,916,050.00	
3⅛% Bonds of 1946-49		819,497,500.00	
3% Bonds of 1951-55		759,494,700.00	
			5,215,942,800.00
Treasury Notes:			
3% Series A-1934	$211,234,600.00		
2¾% Series B-1934	345,292,600.00		
3⅛ Series A-1935	416,602,800.00		
3¼% Series A-1936	365,138,000.00		
2¾% Series B-1936	360,533,200.00		
2¾% Series C-1936	572,419,200.00		
3¼% Series A-1937	834,401,500.00		
3% Series B-1937	508,328,900.00		
2⅝% Series A-1938	277,516,600.00		
4% Civil Service Retirement Fund—		3,924,467,400.00	
Series 1933 to 1937		219,000,000.00	
4% Foreign Service Retirement Fund—			
Series 1934 to 1937		2,057,000.00	
4% Canal Zone Retirement Fund—			
Series 1936 and 1937		2,164,000.00	
			4,147,688,400.00
Certificates of Indebtedness:			
Tax—			
1½% Series TJ-1933	373,856,500.00		
4% Series TAG-1933	469,089,000.00		
1¼% Series TS-1933	451,447,000.00		
¾% Series TD-1933	254,364,500.00		
4¼% Series TD 2-1933	473,328,000.00		
Special—		2,022,085,000.00	
4% Adjusted Service Certificate Fund—Series 1934.		96,900,000.00	
			2,118,985,000.00

(Footnote continued on p. 15.)

for payment "in gold coin of the present standard of value." The claimant contends, however, that this clause is to be construed as if it were a gold-value clause. We do not believe that the constitutionality of the Joint Resolution is any less clear as applied to one type of gold clause rather than another; and the reasoning of this brief applies generally to any one type as well as to the others. To the claimant, however, it appears important to establish that his gold clause is of the second, or gold value, type. Indeed, an analysis of his argument leads to the conclusion that he does not seriously deny the constitutionality of the Joint Resolution as applied to gold clauses of the third type which fix the mode of payment. (See especially pages 30, 34, and 38 of claimant's brief.)

For the reasons stated in pages 114 to 123 of the brief in cases No. 471 and No. 472, the gold clause in claimant's bond should be construed as fixing the mode and not the measure of payment. Claimant

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[12] Footnote continued from page 14.

Treasury bills (maturity value):		
Series maturing June 7, 1933	$75,216,000.00	
Series maturing June 21, 1933	100,569,000.00	
Series maturing June 28, 1933	100,158,000.00	
Series maturing July 5, 1933	100,096,000.00	
Series maturing July 12, 1933	75,733,000.00	
Series maturing July 19, 1933	75,188,000.00	
Series maturing July 26, 1933	80,295,000.00	
Series maturing Aug. 2, 1933	60,655,000.00	
Series maturing Aug. 9, 1933	75,067,000.00	
Series maturing Aug. 16, 1933	75,442,000.00	
Series maturing Aug. 23, 1933	60,078,000.00	
	878,497,000.00	
Total interest-bearing debt outstanding		$21,368,438,420.00

(Compiled from Preliminary Statement of the Public Debt, May 31, 1933, appearing on page 4 of the Daily Statement for the United States Treasury for that date.)

argues, however, that gold clauses in Government bonds are different from gold clauses in private obligations because of an Act passed by the Congress in 1869. This Act, as previously mentioned, provided for the payment of certain government obligations "in coin or its equivalent", without, however, specifying the standard of weight or fineness of the coin or limiting the coin to gold, silver, or other metal. The claimant, on the basis of this statute, makes the startling suggestion that this phrase "or its equivalent", applied as it was to such coins, is to be read into his gold clause, but there applied only to gold coin of a particular standard of weight and fineness. The Act of 1869 contained nothing to prevent the Congress from reducing the content of the gold or silver dollar and discharging the obligations to which the statute referred, in coin of reduced content (*Legal Tender Cases,* 12 Wall. 457, 551, 552), whether such coins were of gold or silver.

Whatever significance the Act of 1869 may have had when it was passed has long since been lost to the claimant by subsequent legislation.[13] The principle of the parity acts is that every dollar coined or issued is equal in value to every other dollar. It

[13] For a further discussion of the Act of 1869 see footnote 49 on page 66, *infra.* The fact that subsequent gold-clause legislation enacted by the Congress departed from this language by excluding " or its equivalent ", must be taken as a positive expression of the Congressional intent to exclude the gold-value interpretation.

would be violative of the entire principle of the parity acts for the United States to agree to pay an amount in one form of money measured, however, by another form of money which it has provided shall have, and which has, the same value. An intention in 1917 to make such an agreement, inconsistent with intervening legislation, is not to be implied from the Act of 1869.

2. There was a reasonable basis for the Congressional determination that the gold clause is contrary to public policy, inconsistent with our present monetary system, and an obstruction to the exercise by the Congress of its monetary and other powers

A. Justification of the gold clause was removed when the dual monetary system was ended by the parity provisions

B. The gold clause is an obstruction to the exercise of the powers of the Congress, as shown by its bearing upon recent legislation designed to cope with the monetary and financial crisis

See brief in No. 471 and 472, pp. 18–68

The discussion on pages 44 to 68 of the brief in Nos. 471 and 472, having placed the emphasis upon the effect of the gold clause in private obligations, will now be supplemented by further consideration of the effect of the gold clause in Federal obligations.[14]

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[14] The Government's brief in cases No. 741 and No. 742 (pp. 120–123) refers to and distinguishes the decisions of the House of Lords in the *Feist* case, and of the Permanent Court of International Justice at The Hague, in the *Serbian and Brazilian Bond* cases, which it is believed have no bearing upon the cases now before this Court. The decisions in

Consideration should first be given to the reasonableness of the Congressional action in reversing, in effect, its policy with respect to gold clauses. If the gold clause is against public policy today, why did earlier Congresses sanction its use in the obligations of the United States?

In the brief in cases No. 471 and No. 472 it is pointed out that the gold clause was not inconsistent with a dual monetary system; in fact, as indicated by the Court in *Bronson* v. *Rodes* (7 Wall. 229, 251–253), a coin clause was a natural, if not a necessary, complement of such a system. It was while this dual system existed that the Congress first provided for gold clauses as a part of a Federal securities issue.[15] It is believed that succeeding Congresses in continuing gold clauses of one type or another in Federal obligations followed a precedent which the recent emergency has disclosed to be

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those cases turned entirely upon the meaning to be given to the gold clause in the absence of any statute intended to abrogate such clauses. As bearing upon the constitutional principles here involved or upon the sovereign power of this country to control its own currency, to regulate the value thereof, to prescribe what shall be legal tender, and to annul contracts declared by the Congress to be against public policy, the high tribunals which decided them would, no doubt, be the first to assert that they are not to be regarded by this Court even as persuasive authority.

[15] Bonds issued pursuant to Act of March 3, 1863, c. 73, 12 Stat. 709; Act of March 3, 1864, 13 Stat. 13; and Act of March 18, 1869, c. 1, 16 Stat. 272.

inapplicable after the dual monetary system was ended.[16]

Until very recently no change had been made in the standard of weight or fineness of the gold dollar since the Act of January 18, 1837 (5 Stat. 136); and, so far as can be ascertained, no serious consideration was given to any change during that period. It was not unnatural, therefore, that debtors should accept the most stringent type of gold clause without serious thought as to its true import; and that the present-standard-of-value clause or a similar clause should become standard language in practically every bond and note issued in the United States. Against such a background Federal obligations without a gold clause would have been anomalous. It was this almost universal use of the gold clause in public and private obligations that created the problem confronting the Congress in 1933. Such clauses in a few obligations might not have obstructed the power of the Congress to regulate the value of the dollar, but gold clauses in $100,000,000,000 of obligations, upon which the annual service charge was as great as the entire monetary gold stocks of the

[16] The preamble to the Joint Resolution recites: "the existing emergency has disclosed that * * * [gold clauses] * * * obstruct the power of the Congress * * * and are inconsistent with [the parity provisions]." Appendix page 38. See brief in cases No. 471 and No. 472, pages 18 to 28.

United States,[17] produced a situation which could not have been fully foreseen when earlier Congresses adopted such clauses for Federal obligations and when later Congresses followed their example.

It was natural to think after the experience of the Cleveland Administration, that only an inadequacy of the supply of monetary gold could compel the United States to suspend the redemption of its currency in gold.[18]

It required the devaluation of foreign currencies, the suspension of redemption of currencies in gold by the principal countries of the world, and the subsequent depreciation of the English pound and other leading currencies, to make clear to this country the deflationary effect of a monetary unit and a debt and credit structure tied to gold at a

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[17] See brief in cases No. 471 and No. 472, pages 53 to 58.

[18] It was an inadequacy of gold reserves which in the opening months of the second Cleveland Administration caused the fear that redemption in gold could not be maintained by the Government. With other factors, a sharp reduction in revenues, attended by increased expenditures, and a change in the kind of money received for custom duties, had operated to drain the gold reserves down to $96,000,000.00 in April of 1893. In fact, at one time the New York Sub-Treasury was within 48 hours of gold exhaustion. D. R. Dewey, *Financial History of the United States* (11th Ed. 1931), pp. 442 to 445; A. B. Hepburn, *A History of Currency in the United States* (1924), pp. 348, 354 and 358.

level which had been abandoned by so large a part of the world.[19]

On the following page is a chart showing the extent to which the monetary units of the countries whose economic systems most directly affect our own have been devalued or permitted to depreciate.[20] The chart shows the percentage of the pre-

[19] This is well illustrated in The Annalist Weekly Index of Wholesale Commodity Prices, reproduced in claimant's brief, appendix, p. XIV.

[20] The chart, prepared by the Division of Research and Statistics, Treasury Department, was based upon the following table:

Gold value of leading currencies (October 1932 and October 1934, as percentage of pre-war parity with gold)

[Sources: Monetary Units and Coinage Systems of the Principal Countries of the World, Bureau of the Mint, Treasury Department, 1916 and 1929; League of Nations, Monthly Bulletins of Statistics]

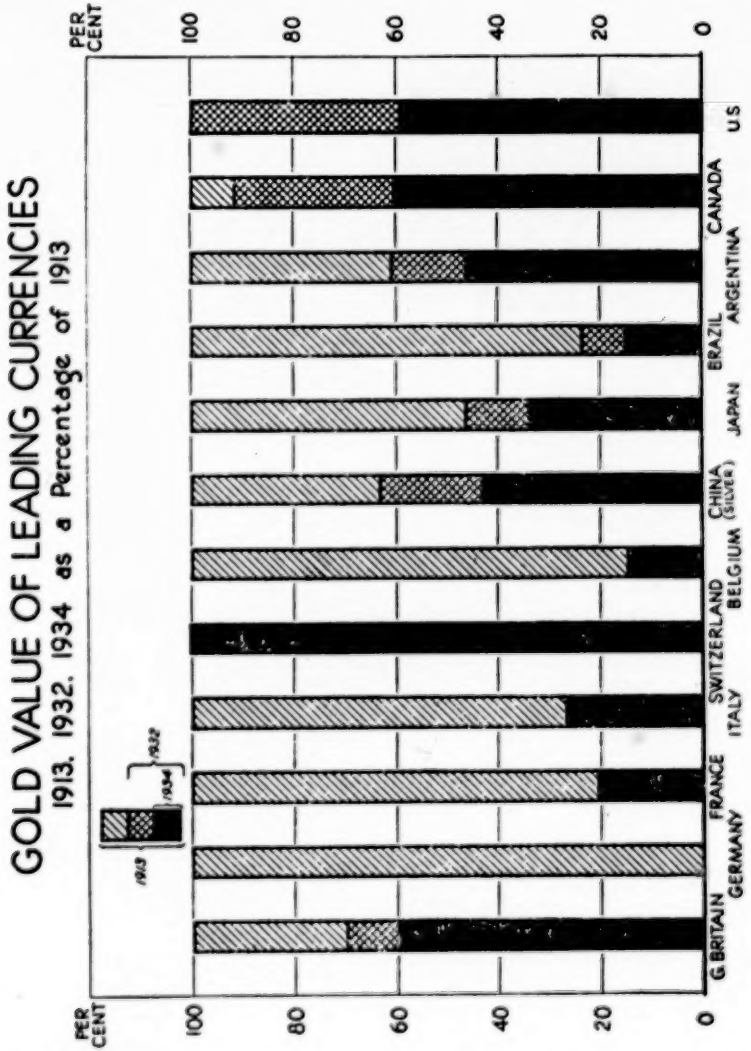
	Pre-war gold parity (U. S. cents)	Percentage of pre-war gold parity	
		October 1932	October 1934
Great Britain	486.65	69.79	59.96
Germany	23.821	----------	----------
France	19.295	20.35	20.26
Italy	19.295	26.53	26.33
Switzerland	19.295	100.03	100.34
Belgium	19.295	[1] 14.40	[1] 14.36
China	[2] 46.63	[2] 63.08	[2] 42.93
Japan	49.846	46.26	33.98
Brazil	32.44	23.49	14.92
Argentina	42.452	60.73	45.84
Canada	100.00	91.23	60.31
United States	100.00	100.00	59.06

Treasury Department, Division of Research and Statistics. Dec. 27, 1934.

[1] Values for Belgium relate to equivalent of pre-war franc or one-fifth present Belga.

[2] China has no gold unit. Pre-war parity based on price of a fine ounce of silver in New York in 1913, or $0.6124.

war parity of their currencies and our own in October 1932, when only the dollar and the Swiss franc were at 100 percent; and the ratio in October 1934



when the dollar, the pound and the Canadian dollar were each at approximately 60 percent of pre-war

parity. The currencies of all the other countries, except Switzerland, were at a still smaller percentage.

Only if it be assumed that in 1917, upon the passage of the Liberty Bond Acts (40 Stat. 35, 288), the Congress could have foreseen the economic consequences of the World War and could have envisaged the possibility of the developments of the last few years, could it fairly be said that its action in providing that the Liberty bonds should be paid in gold coin of a standard of value fixed in 1837 was a determination that such a provision was not against public policy under conditions such as those which confronted the 73d Congress in 1933. In the absence of such prescience on the part of the 65th Congress it was not unreasonable for the 73d Congress, taught by the emergency and the implications of $100,000,000,000 of gold-clause obligations, to declare such clauses against public policy.

(*i*) *The gold clause—an obstruction to the power of the Congress to maintain the parity of all coins and currencies of the United States.* (*See brief in No. 471 and No 472, pp. 45–48*)

When the Government found it necessary to suspend redemption of currency in gold, one group of private creditors would have been preferred to another, if redemption of the currency had been discontinued but the way kept open for gold-clause creditors to enforce the asserted obligation of their bonds.

The preference is accentuated in the case of Federal gold-clause obligations. Besides the holders of some $20,000,000,000 of gold-clause interest-bearing obligations of the Federal Government, there were the holders of more than $5,000,000,000 of currency issued or guaranteed by the Federal Government, not to mention the holders of a much vaster amount of obligations in the form of bank deposits, insurance contracts, and other agreements payable in currency of the United States. Gold clauses were contained in or made with respect to all of this currency; in the case of the greenbacks by a specific provision that such notes when presented to the Treasury for redemption, shall be redeemed in gold coin of the standard fixed by the Act of March 14, 1900 (c. 41, Sec. 2, 31 Stat. 45); in the case of gold certificates by the provision that they should be redeemable in gold coin on demand (c. 41, Sec. 6, 31 Stat. 47, as amended; in the case of Federal Reserve notes by the provision that they should be redeemable in gold when presented at the Treasury (Section 16, Federal Reserve Act, as amended, 38 Stat. 265); and in the case of all currency by the provisions of the parity acts that "all forms of money issued or coined by the United States shall be maintained at a parity of value with" the gold dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine (Act of Nov. 1, 1893, c. 8, 28 Stat. 4; act of March 14, 1900, c. 41, 31 Stat. 45; Federal Reserve Act of Dec 23, 1913, c. 6, sec. 26, 38 Stat. 251, 274).

Once the conviction began to gain acceptance that the United States would soon be forced to check the downward spiral of prices by cutting loose, as practically every other country had done, from its tie to the pre-war unit, a run was started on the nation's monetary stocks similar to and coincident with the run on the nation's banks.[21] The accelerated currency and gold withdrawals are illustrated by the chart appearing at page 40 of the brief in cases No. 471 and No. 472.

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[21] "The crises in Austria and Germany caused withdrawals from London. * * * England's inability to face further deflation had been demonstrated * * *. Thus England was forced off gold.

"A year and a half later America was driven off gold too; after three great runs on our gold; after three great resulting waves of panic and deflation, in 1931, 1932, and 1933; long after every other great power, every nation indeed except Holland and Switzerland, had abandoned the pre-war standard. America resisted five long months after President Hoover had publicly stated on the authority of the Secretary of the Treasury that the country had once already been within two weeks of going off. * * *

"We had more gold than England; so we could stand the strain longer; and because we could stand it longer we suffered more. We had more gold and so we had a more top-heavy credit structure; and for that reason too we suffered more. The circumstances were different but the ultimate cause was the same. Both countries were forced off by the impossibility of maintaining both the pre-war gold parity of their currencies and the post-war price level; and the impossibility of enduring further deflation of that price level. The burden of debts had become unbearable." Russell Leffingwell, former Assistant Secretary of the Treasury. Proceedings of the Academy of Political Science, Vol. XVI, No. 1, April 1934, p. 76.

Gold payments had to be suspended until it was established whether or not the gold content of the dollar would be decreased and until the new weight of the gold dollar was determined. No reason has been advanced why the holders of the interest-bearing time obligations of the United States should, by reason of the gold clause in their bonds, be preferred to the holders of the non-interest-bearing demand obligations of the United States. These demand obligations include all of the currency of the United States as to which the undertakings of the Government are no less solemn than those in the gold-clause interest-bearing obligations.[22]

The gold clause in the Government bonds construed as a single obligation to pay coin, would have made it impossible for the United States to have suspended gold payment and to have preserved its gold reserves. The holders of $20,000,000,000 principal amount of Federal obligations, the annual interest charge on which was about $700,000,000, could in a relatively short time have

[22] A Norwegian law of December 15, 1923, quoted at page 150 of the Appendix under separate cover, recognized the necessity for equal treatment of holders of gold-clause securities and gold-clause currency. It provided that if the holder of a contract to pay gold crowns refused to accept payment in notes of the Norges bank of equal face amount, the debtor could demand a moratorium lasting as long as the Norges bank was freed of its obligation to redeem its notes in gold. (See *Foreign Securities*, Madden & Nadler (1929), page 317.)

drained all of the available gold held by the Treasury. The gold clause in Federal obligations, if enforceable by these creditors, would have transferred the destiny of the gold reserves and the destiny of the currency to private hands.

(*ii*) *The gold clause—an obstruction to the power of the Congress to regulate the value of money. See brief in No. 471 and No. 472, pp. 48–53.*

Regardless of whether the amount of the Federal obligations containing the gold clause was so large as to have made it impossible for the Government to continue the service on its debt after reduction of the gold content of the dollar, the gold clause could not be enforced in outstanding public obligations without injury to public and private debtors and creditors and to the public at large caused by treating public and private gold obligations differently. In a dollar economy, the gold content of the dollar can be increased or decreased with equal justice to debtors and creditors, provided the increase or decrease is made applicable to all alike. The moment the application is limited, relative discrepancies necessarily follow just as they followed in the dual monetary system of the post Civil War period. By providing that the monetary legislation, including the Joint Resolution, should apply equally to all obligations, relative values of the obligations remained unchanged.

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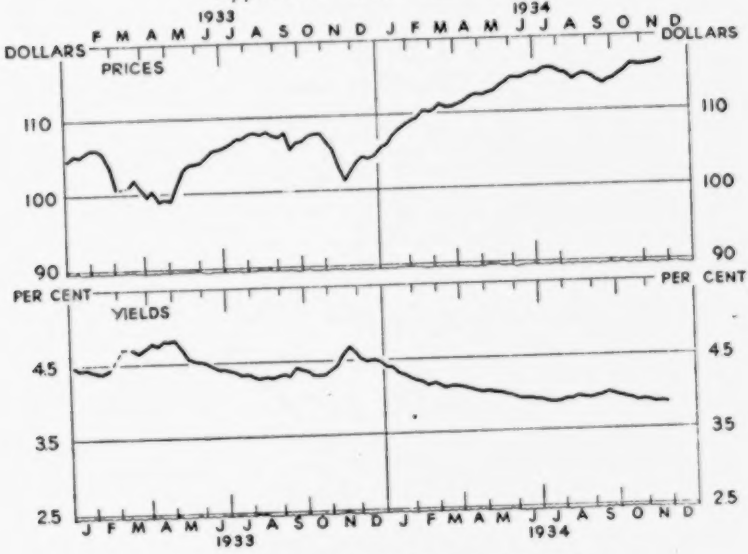
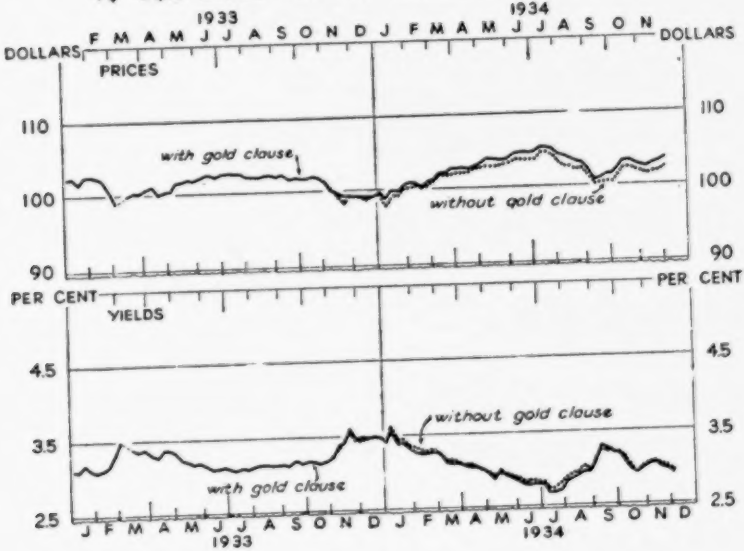
DOMESTIC CORPORATE GOLD CLAUSE BONDS

Based on Yields of Moody's 30 Aaa Bonds
Applied to 4¼%-31 Year Bond



U.S TREASURY BONDS

3⅜% Bonds 1943-47 With Gold Clause
4¼-3¼% Bonds 1943-45 Without Gold Clause



This is substantiated by the charts on the opposite page showing the market value in legal tender of Government and private gold-clause obligations over the period January 1933 to November 1934.[23]

If the gold clause had not been abrogated in Government obligations, an increasing discrepancy would have separated the prices of Government and private gold-clause obligations. Investments in private gold-clause obligations would have suffered by the flight from private obligations to Government gold-clause obligations, and investments like those of the claimant would have reaped a

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[23]An analysis of the opposite charts leads to the conclusion that bond prices were not affected by the gold clause or by the action of the Government with respect to gold or gold clauses except as all obligations benefited by improved conditions.

The chart, prepared by the Division of Statistics and Research, United States Treasury Department, is based upon Moody's Index for thirty Aaa bonds (see Moody's Investment Weekly Survey, 1933 and 1934) and the prices for the United States Treasury bonds are based upon figures obtained from the New York Stock Exchange.

It should be stated that all of the thirty bonds used in the Moody Index, but one, contain gold clauses. The one exception is Chicago, Burlington & Quincy 4's of 1958. See chart on page 73 *infra*. Of the 29 gold-clause bonds, 27 contain gold clauses of the third type (that is, specifying the mode of payment) and 2 contain gold-value clauses.

harvest by the artificial demand created for Government bonds.[24]

While the Federal Government might have devalued the dollar and for a time maintained the service on its gold-clause obligations in gold and thereafter in an amount of money sufficient to purchase gold coin of the old standard, or its equivalent by weight, the income of the Government would necessarily have had to be increased from taxation to meet this enhanced charge. Such an increase in taxes at a time when the debt burden was already disturbing the economy of the country was to be avoided. Eventually the Government might have found itself obliged to follow the course that was pursued at the end of the Civil War, when, in order to pay its obligations in coin, greenbacks were denied legal tender quality for payment of customs duties (Act of February 25, 1862, 12 Stat. 345). Thus, to have continued payment on the public debt in gold coin of the old standard or its equivalent

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[24] The purchasing power of the dollar expressed in terms of wholesale prices (1926 equals $1) of all commodities was in 1918 $.762; in 1933, $1.517; and for the first six months of 1934, $1.36. (The United States Department of Labor, Wholesale Prices, October 1934, Serial No. R–186, page 4.) In other words, a dollar in 1933 would purchase two times and in 1934, 1.7 times the amount that it would have purchased in 1918. If the gold clause in Government obligations were sustained and construed to entitle the holders to $1.69 on every dollar face amount of the bond, a ten thousand dollar gold-clause bond would in 1934 purchase 2.87 times as much as the $10,000 invested in such bond in 1918.

by weight after reducing the gold content of the dollar would, in effect, have led toward a return of a dual monetary system.

(*iii*) *The gold clause—an obstruction to the power of the Congress to borrow money* (*see brief in cases No. 471 and No. 472, pp. 58–62*)

The gold clause seriously interfered with the exercise of the Government's borrowing power when the Congress found it necessary to suspend gold payments and reduce the gold content of the dollar.

It can no more be contended that the Joint Resolution was made applicable to outstanding Federal obligations in order to relieve the Government of a portion of its debt than it can be contended that the dollar was devalued in order to lessen the burden of the Government's own non-gold-clause debts. The gain and loss, in terms of grains of gold, on the books of the Government was an incidental result. The measures affected the Government in every respect in which it acted in a proprietary capacity just as they affected the individual citizen.[25] It is noteworthy that the Joint Resolution explicitly provides that it applies as well to the gold-clause obligations due the United States as to those owing by the United States. Included

[25] By the reduction of the gold content of the dollar the value of the gold held in the Treasury either as free gold or as reserves or security for currency, increased in value in terms of dollars. This increase in value came as a result of the action of the Government. One of the purposes of the

among the gold-clause obligations held by the United States were some $11,000,000,000 principal amount of war debts.[26]

That the Joint Resolution was enacted in the general public interest and not in the proprietary interest of the Government is recognized by courts at The Hague (*Royal Dutch Shell Co.,* and the *Batavia Petroleum Co.,* judgments by the Hague Court, dated Feb. 15, 1934), in Vienna (*International Federal Loan of Austria* [1930, American section], 1934 Die Rechtsprechung 82), and in Copenhagen (*Soderberg* v. *Copenhagen Tel. Co.,* Superior Court for the Eastern District of Denmark, Feb. 3, 1934), which have had occasion to deal with the question whether effect should be given to the Joint Resolution in suits before them. The Hague Court said in the *Royal Dutch Shell case:* "There cannot be any question about viola-

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Orders requisitioning gold, in addition to replenishing the reserves for the currency, was to assure that in the event of a reduction in the value of the dollar for the benefit of the country as a whole, no person or class of persons should reap a profit (by reason of the increased price of gold) that was not shared equally by all. The Federal Reserve banks, which required gold as a reserve for their currency, nevertheless recognized that any "profit" from devaluation should accrue to the United States for the benefit of the country as a whole. See remarks of Mr. Black, Governor of the Federal Reserve Board, Hearings of the Committee on Banking and Currency of the Senate on the Gold Reserve Act of 1934, page 13.

[26] See Treasury Department Statement of Securities Owned by the United States, June 1933.

tion of public order, as the measure [the Joint Resolution] has, according to its purpose set forth in the preamble, been enacted, as required by urgent necessity and public [American] interest, and not at all—here the claimant himself agrees—in order to injure the creditors." [27]

After the Act of May 12, 1933 (48 Stat. 31, 52), authorized the President to decrease by as much as fifty percent, the weight of the gold dollar, the Treasury could not issue bonds calling for payment in gold coin of the old standard without knowingly incurring a debt which might amount ultimately to twice the amount borrowed. To borrow money upon such terms would have been to favor a few investors at the expense of all the taxpayers. Nor could this dilemma be avoided by leaving the gold clause out of the new bond issues while sanctioning

[27] Quotation taken from Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Journal, 53, 76. This writer, Visiting Professor of Law, Columbia University; formerly Professor of Law, Berlin University, states: "It must be appreciated, however, that the American statute requires, in a sense of fairness and at American cost, a thoroughly equal treatment of non-American debtors as well as creditors. It would have been a fairly shrewd stroke of business for the United States to exclude from the benefits of the act, according to the French doctrine, contracts involving 'international payments.' Such an exception would have brought in a profit to the United States similar to or greater than that taken by France." *Idem*, p. 78. In this quotation the author was speaking of obligations due the Government as well as private persons.

such clauses in outstanding public or private obligations, for investors, so long as it was anticipated that the President might exercise his power under the Act of May 12, 1933, would so prefer the old issues as to impose prohibitive rates upon the new. Moreover, to prohibit gold clauses in new obligations and sanction them in the old would have been to permit a revival of the dual monetary system of the middle nineteenth century. Senator Fletcher, Chairman of the Committee on Banking and Currency, which reported the Joint Resolution, stated:

> The situation cannot be met merely by enabling new obligations to be payable in legal tender without creating a difference in value between the old and the new obligations and impairing or destroying the market for new obligations. * * * It will interfere both with financing of the Government and financing of private enterprise. *We would pass two different kinds of currency if we were to attempt that.* (77 Cong. Rec., Pt. 5, 4890.) (Italics ours.)

An official Treasury statement issued May 26, 1933 (quoted in full at page 26 of the brief in cases Nos. 471 and 472), stated that the purpose of the Joint Resolution was to make it clear that all obligations, past and future, should be upon the same footing.

The Treasury statement to which reference was just made calls attention to another provision of the Joint Resolution; that is, the provision prohibiting the use of gold clauses in obligations, public or private, thereafter incurred. The Govern-

ment could not, of course, continue the use of gold clauses in its obligations after such provisions were declared by the Congress to be against public policy. Private debtors might, on the other hand, have continued to use such clauses in the hope that at some future time they would be sanctioned by the Congress; and so long as such a possibility existed, new issues of public obligations would suffer in comparison with private obligations which contained this speculative advantage.

When we consider the wide use made of Government obligations by sale and hypothecation, it is manifest that they are an important factor in the money market. It is equally clear that bonds in which the gold clause was allowed to remain would adversely affect the market available for other types of bonds and thereby impair and obstruct the borrowing power of the Government.

(iv) The gold clause—an interference with the powers of the Federal Government over international relations, foreign exchange transactions, and foreign commerce (see brief in Nos. 471 and 472, pages 62–68)

3. The Joint Resolution is within the powers of the Congress

A. Power over the coinage and currency (see brief in Nos. 471 and 472, pp. 48–53)

In the Act of May 12, 1933 (48 Stat. 31), as amended by Section 2 of the Joint Resolution of June 5, 1933 (48 Stat. 112), it is provided:

> All coins and currency of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, * * *.

There is strong basis for the belief that this provision, by itself, accomplished everything that was sought to be accomplished by section 1 of the Joint Resolution with respect to gold clauses in public and private obligations,[28] and that the power of Congress to declare all forms of money legal tender for existing and future contracts, of neces-

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[28] A statement of the Treasury of May 26, 1933, read in part as follows:

"Recently the Thomas Amendment to the Agricultural Relief Act has made all coins and currencies of the United States legal tender for the payment of every debt, public and private. Due, however, to the language used doubt has arisen whether obligations expressed to be payable in a particular kind of money, such as gold coin, may be satisfied by payment in other forms of legal tender.

"While the Supreme Court of New York is reported to have held in a recent case that an obligation calling for payment in gold coin could be satisfied by payment of other lawful forms of money (*Irving Trust* v. *Hazlewood*, N. Y., Law J., May 25, 1933, p. 3160, col. 2), confusion may be created if the existing legislation is differently construed in other jurisdictions. One of the purposes of the resolution is to remove any doubt and to avoid confusion, so that debtors and creditors may have a clear definition of their legal position." (The Treasury statement is quoted in full at p. 26 of the brief in Nos. 471 and 472.)

sity carries with it the power exercised in Section 1 of the Joint Resolution.

When the debt under consideration in the *Legal Tender Cases* (*Parker* v. *Davis*) was incurred gold and silver coins alone were legal tender. The creditor could be presumed to have anticipated satisfaction of his debt in gold or silver coin of the existing standard with no less justification than the present creditor of a gold-clause obligation. A creditor who in 1918 lent $10,000 and accepted a non-gold-clause promissory note therefor payable in 1934 may be presumed to have anticipated satisfaction of his debt in a gold dollar of the standard fixed in 1837, no less than the purchaser of a Government bond containing a gold clause similar to that applicable to "greenbacks" (see page 24, *supra*); yet, since the decisions in the *Legal Tender Cases* and *Juilliard* v. *Greenman*, 110 U. S. 421, no serious question remains of the power of the Congress to provide that non-gold-clause debts incurred in 1918 may be discharged in currency that was not legal tender in 1918, notwithstanding that between the date the debt was incurred and the date of payment the gold content of the dollar was reduced from 25.8 to $15\frac{5}{21}$ grains of standard gold. (See 12 Wall. 457, 551, 552.) The rationale of these cases supports the conclusion that Congress likewise has the power to declare that obliga-

tions in which the gold clause is expressed may be similarly discharged.[29]

Justice Field in his dissenting opinion in the *Legal Tender Cases* recognized that to hold that Congress had the power to make United States notes legal tender for debts theretofore incurred meant that Congress had the *power* to make such notes legal tender for debts specifically stated to be payable in gold coin. Justice Field stated at page 673 as follows:

> * * * Express contracts for the payment of gold or silver have been maintained

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[29] In the *Legal Tender Cases* the Court, in speaking about United States notes, said at page 530:

"Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. * * *"

And in *Juilliard* v. *Greenman*, the Court said at page 448:

"This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals."

> by this court, and specifically enforced on the ground that, upon a proper construction of the act of 1862, in connection with other acts, Congress intended to except these contracts from the operation of the legal tender provision. But the power covers all cases if it exists at all. The power to make the notes of the United States the legal equivalent to gold and silver necessarily includes the power to cancel with them specific contracts for gold as well as money contracts generally. Before the passage of the act of 1862, there was no legal money except that which consisted of metallic coins, struck or regulated by the authority of Congress. Dollars then meant, as already said, certain pieces of gold or silver, certified to be of a prescribed weight and purity by their form and impress received at the mint. The designation of dollars, in previous contracts, meant gold or silver dollars as plainly as if those metals were specifically named.

The case of *Bronson* v. *Rodes,* 7 Wall. 229, does not negative the existence of this power. That case construed the word "debts" in the Legal Tender Acts as not including obligations expressly calling for payment in coin. The Court did not decide that the Congress could not have made greenbacks legal tender for obligations expressly stipulating payment in coin. Indeed, the power of the Congress to make currency legal tender would be a

nullity if it could be avoided by such a stipulation in the contract.[30] This was confirmed by Justice Bradley in his concurring opinion in the *Legal Tender Cases*, 12 Wall. 457, 567:

> * * * I do not understand the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie.

Before the Court had construed the word "debts" as used in the Legal Tender Acts not to include agreements to pay coin, the courts of last resort of at least five States, construing the Legal Tender Acts to include coin or specie obligations,

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[30] "The substantial effect of the *Legal Tender* decisions was to hold that Congress could provide that something other than gold and silver coin should be made a legal tender in payment of debts * * *. If the gold clause were allowed to be controlling, however, the *Legal Tender* decisions would be a dead letter. They would merely be a case of 'law in books'; the law in action would be that everyone who was smart enough to stipulate for gold expressly would be entitled to exact payment in gold or the equivalent in exchange value as determined by private markets and the bargaining of speculators, quite irrespective of what the policy of Congress in relation to the currency, adopted in solemn legislative form for the benefit of the whole people, might be." (Charles S. Collier, *Gold Contracts and Legislative Power*, 2 The George Washington Law Review 303, 309.)

upheld, or assumed, the constitutionality of the Acts as so construed.[31]

If, in order to assure uniformity and parity of value to the various forms of coin and currency of the United States, the Congress has the power to tax an issue of State bank notes for the purpose of driving them out of circulation (*Veazie Bank* v. *Fenno,* 8 Wall. 533), to tax banks which paid out as currency notes of any town, city, or municipal corporation (*National Bank* v. *United States,* 101 U. S. 1), to reduce or increase the content of gold and silver coins (4 Stat. 699; 5 Stat. 136; *Legal Tender Cases,* 12 Wall. 457, 551), to regulate the value of dollars in terms of foreign money (1 Stat. 41; 5 Stat. 496; 17 Stat. 602; *The Collector* v. *Richards,* 23 Wall. 246), and to prohibit the export of coin in order to counteract the effect of the fluctuation in the market value of gold and silver (*Ling Su Fan* v. *United States,* 218 U. S. 302), then the Congress has no less authority to declare against public policy and to prohibit the use in public as well as private obligations of provisions which are not only inconsistent with, but destructive of, the uniformity and parity of different kinds of coin and currency of the United States.

If the gold clause were sustained, it would have the effect of continuing the existence of the prior

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[31] *Warnibold* v. *Schlichting,* 16 Ia. 243; *Buchegger* v. *Shultz,* 13 Mich. 420; *Schollenberger* v. *Brinton,* 52 Pa. St. 9; *Woods* v. *Bullens* (Mass.) 6 Allen 516; *Rodes* v. *Bronson,* 34 N. Y. 649; Cf. *Bronson* v. *Rodes,* 7 Wall. 229, 258.

gold coins as a measure of determining the amount of an obligation despite the action of the Congress in abolishing such gold coins. Just as the Congress has the power to drive out of circulation competing coins and currencies created by the States, in order to regulate the value of money and maintain the uniform value of all coins and currencies of the United States, so must it have the power to abolish coins and currencies adopted by persons as a means of payment and similarly to abolish coins and currencies previously issued by the United States. (Cf. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549, and *National Bank* v. *United States,* 101 U. S. 1, 6.)

The power exercised by the Congress in the Joint Resolution is analogous to the power exercised in requiring the delivery of gold coin, gold bullion, and gold certificates [32] (Act of March 9, 1933, 48 Stat. 1, and Executive Orders and Orders of the Secretary of the Treasury issued thereunder), and in making currency of the United States theretofore redeemable in gold coin [33] now redeemable in lawful money or in gold bullion only to the extent per-

[32] The claimant seems to recognize the validity of the Acts, Orders and Regulations requisitioning gold. See pages 16, 34 and 35 of his brief.

[33] The United States agreed to redeem its gold certificates in gold coin (U. S. Code, Title 31, Sections 428 and 429); its United States notes and Treasury Notes of 1890 in gold coin of the standard fixed by the Act of March 14, 1900 (U. S. Code, Title 31, Section 408), and to redeem Federal Reserve notes in gold (Federal Reserve Act, Section 16, 38 Stat. 251).

mitted in regulations issued by the Secretary of the Treasury (Gold Reserve Act of 1934, c. 6, 48 Stat. 337, 340, Sections 2, 5 and 6). If the Congress had the power to require the delivery of gold coin against payment of currency which was legal tender for an equal amount, it would be strange indeed if it did not have the power to accomplish the same result by directing in the first instance the payment of an equal face amount of legal tender for United States gold-clause bonds. Similarly, if the Congress had the power to provide that gold certificates and United States notes should no longer be redeemed in gold coin of the old value, it would seem strange to deny to the Congress the power to redeem Government interest-bearing obligations with a dollar having a lesser gold content. There would appear to be no basis for distinguishing between the owner of gold or currency immediately payable in gold, and the owner of a contractual claim payable in the future in gold coin or its equivalent.

B. Power to borrow money (see brief in Nos. 471 and 472, pp. 58–62)

The borrowing power is referred to in the *Legal Tender Cases,* 12 Wall. 457, 556–560, as supporting the power of the Congress to issue the "greenbacks" and make them legal tender for all debts. As has just been stated (page 37), to concede to the Congress authority to discharge a non-gold clause debt, incurred when only gold and silver coin were legal tender, in currency notes for the redemption

of which the Government assumed no immediate obligation, and to deny to the Congress authority to redeem its gold clause obligations in currency, legal tender for a like amount and in fact accepted for the same amount, would be strange indeed.

C. Power over foreign and domestic commerce and international relations (see brief in No. 471 and No. 472, pp. 77–82)

The Congress reasonably believed that a means of regulating commerce between the States and with foreign nations was to requisition gold, prohibit its hoarding or export, suspend redemption of currency in gold, restrict foreign exchange transactions, place our monetary system upon a gold bullion basis and reduce the gold content of the dollar. The Congress could not have carried out this monetary program effectively unless it abrogated the gold clause in outstanding public and private obligations.

There does not appear to be any serious doubt as to the power of the Congress to pass a law prohibiting gold clauses in future obligations. Cf. *Hepburn* v. *Griswold,* 8 Wall. 603, 615. The constitutionality of such an act rests upon its reasonable relation to the powers of the Congress to regulate the value of money, to borrow money, and to regulate commerce, as well as upon the sovereign powers over coinage and currency. But no distinction can be drawn in this respect between outstanding and future obligations. As has been shown, the continued validity of gold clauses

in outstanding obligations would have constituted as effective a restriction on the constitutional powers of the Congress as would the use of such gold clauses in new obligations. Accordingly, the abrogation of gold clauses in obligations heretofore incurred is as reasonably related to these powers of the Congress as the abrogation of gold clauses in future obligations.

The only question that remains is whether there is any constitutional limitation which prevents the Congress from exercising this power in respect to outstanding obligations.[34]

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[34] In *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467, this Court said at pages 485 and 486:

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

The Court in the *Legal Tender Cases* stated at page 530:

"* * * And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation,

4. No constitutional limitations are infringed by the Joint Resolution

A. The Joint Resolution does not violate the due-process clause of the Fifth Amendment

The claimant contends that the Joint Resolution is "unconstitutional and void as a violation of the Fifth Amendment to the Constitution" on the familiar ground that it is "unreasonable, arbitrary, and capricious" (Page 31).

It appears from the heading which the claimant gives to his argument (Point Two C, page 31) that he apparently relies upon an asserted violation of the due-process clause of the Fifth Amendment. The due-process clause prohibits a deprivation of property without due process of law. As will be shown, *infra* (pages 68 to 70), the claimant confuses the due-process and the just-compensation clauses of the Fifth Amendment. He apparently forgets that he has filed his suit in the Court of Claims under section 145 of the Judicial Code and that the Court of Claims is without jurisdiction of any claim based merely upon a de-

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but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. * * *"

struction of property. Unless there is an actual *taking* of property, with or without due process, no contract implied in fact would arise upon which liability on the part of the Government could be predicated. The claimant must rely upon the theory of his case as framed by the petition, and that is one for a breach of an express contract. However, even assuming that the present action were a case or controversy in which the claimant could properly invoke the due-process clause, the defendant contends that the claimant has not been deprived of private property without due process of law.

To substantiate his charge that the Joint Resolution is unreasonable "the claimant contends that the Joint Resolution * * * cannot be considered to be a regulation of the value of money" and "will not accomplish, or have a reasonable relation to, any proper legislative object."

The title, the purpose, and the effect of the Joint Resolution, "To assure a uniform value to the coins and currencies of the United States", are mistaken by the claimant (see pages 32 et seq. of his brief). He admits that Section 2 of the Joint Resolution, making all coins and currencies legal tender for debts of every kind, is reasonably adapted to assure uniform value to the coins and currencies of the United States, but misconstrues the first section as an attempt to make all obligations of the United States uniform. If the reading of the Joint Resolution itself is not sufficient, a

reference to its history will show that Section 1 is no more than the converse of Section 2.

The Congress expressed its intention that all money should be legal tender for all obligations—gold clause and non-gold clause equally—to avoid the possibility that these provisions might be construed as were the provisions of the Legal Tender Acts in the case of *Bronson* v. *Rodes*, 7. Wall. 229.[35]

The claimant admits that the Government has the power to declare what shall constitute legal tender and to pay the claimant's bond in such legal tender currency (pages 15, 16, 33). He asserts that the only issue presented in the case is "as to the amount of legal tender currency required to satisfy the claimant's bond" (page 16). And on page 35 he contends that because the Joint Resolution "purported simultaneously to standardize the unit of currency in terms of dollar, gold dollar, and gold-value obligations" the Resolution is therefore "unreasonable, arbitrary, and capricious."

At pages 36 and 37 of his brief the claimant contends that on June 5, 1933, gold-value obligations were at a premium in terms of the coins and currencies of the United States in circulation at that time. If he fails to prove this, his entire argument falls.

The claimant's only citation in support of his contention that there was such a disparity in value

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[35] Cf. Treasury Statement of May 26, 1933, printed in full at page 26 of the brief in Nos. 471 and 472.

is the index of wholesale commodity prices contained in the Annalist Weekly of December 14, 1934, at page 817, and reproduced in Appendix, page XIV, of claimant's brief.

The value of the "old gold dollar" as used in said Index is "based on exchange quotations for France, Switzerland, Holland, and Belgium." In other words, the only disparity in value that the Annalist Weekly could find between the "old gold dollar" and other currency of the United States existed in the foreign exchange market abroad. That the "old gold dollar" and other coins and currency in the United States were not at a parity in value in the foreign exchange market abroad is irrelevant, since the Executive Orders effectively prevented the claimant and those similarly situated from exporting gold or otherwise realizing on any increased value of gold in terms of United States dollars in the foreign markets (*Ling Su Fan* v. *United States*, 218 U. S. 502).

We believe we have shown on pages 74 and 75 of this brief and pages 101 to 114, 131, and 132 of the brief in cases Nos. 471 and 472 that on June 5, 1933, there was no disparity in value in the United States between the gold dollar and other coins and currency of the United States. That being true, claimant's argument fails.

Moreover, it should be pointed out that the claimant's argument is in effect the argument made and rejected in the *Legal Tender Cases*. If the Gov-

ernment has the power to declare what shall be legal tender for contracts solvable in money, it is immaterial that there may be a difference between the intrinsic value of the specific coin or currency stipulated in the contract and other legal-tender coin or currency. Cf. dissenting opinion of Justice Field, 12 Wall. 457, 673.

The claimant's brief also mistakes the relation of the Joint Resolution to the monetary and other powers of the Congress. Like the legislation sustained in the *Veazie Bank* case,[36] it is a measure to assure the effectiveness of the direct exercise of these powers in other legislation such as the prior Act of May 12, 1933, and the subsequent Gold Reserve Act of 1934. The reasonableness of the Joint Resolution and the appropriateness of its provisions, when seen in this, its true light, are demonstrated in pages 18 to 68 of the brief in cases No. 471 and No. 472.

(i) The Legal Tender Cases are conclusive that Sections 1 and 2 of the Joint Resolution do not violate the Fifth Amendment.

It is not necessary to reason from analogy to sustain the Resolution against the contention that it violates the Fifth Amendment. This Court in effect determined that such an exercise of the legis-

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[36] *Veazie Bank* v. *Fenno*, 8 Wall. 533; see also *National Bank* v. *United States*, 101 U. S. 1; *Ling Su Fan* v. *United States*, 218 U. S. 302. See brief, in cases No. 471 and No. 472, pages 18, 44, 45, 74, 75.

lative powers was valid when it decided the *Legal Tender Cases.*

As gold and silver coin alone were legal tender before the Legal Tender Acts were passed, every dollar obligation carried an implied coin clause. In deciding that obligations of this character were satisfied upon payment, dollar for dollar, in irredeemable greenbacks, the Court passed upon legislation in principle no different from the Joint Resolution; and in deciding that such legislation was a reasonable exercise of the constitutional monetary and other powers and did not constitute a taking of private property in violation of the Fifth Amendment, the Court upheld legislation having the same purpose and effect as the Joint Resolution. Nor can it be said that this Court did not advert in the *Legal Tender Cases* to the consequences of its ruling in the event of a reduction in the metallic content of the dollar. In sustaining the Legal Tender Acts the Court drew an analogy from the situation which existed when the Congress did in fact reduce the gold content of the dollar and made the new money of lesser weight legal tender, dollar for dollar, for debts incurred with reference to the old money of greater weight.

The Court said at pages 551–2:

> Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment,

which forbids taking private property for public use without just compensation or due process of law.

* * * * *

* * * By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six percent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six percent less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the fifth amendment? And has any one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted? Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an

> illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six percent less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. * * *[37]

It will be recalled that Mr. Justice Field, in the *Legal Tender Cases*, dissented from the opinion of the majority on the ground that the Legal Tender Acts did violate the Fifth Amendment. He recognized, however, that, if the Legal Tender Acts as construed by the Court did not violate the Fifth Amendment, it would not be violated by a legal tender act which like the Joint Resolution, leaves no ground for the construction that it does not apply to gold-clause obligations (12 Wall. 457, 673).

While the *Legal Tender Cases* involved controversies between private debtors and creditors, the decision was understood by the Court, and has since been understood, to sustain the constitutionality of

[37] See also the concurring opinion of Bradley, J., at pages 555–6.

the Legal Tender Acts as applied to public, as well as private debts. The order of the Court reopening the question of the validity of the Legal Tender Acts was made sufficiently broad to include public debts,[38] and the majority opinion was equally comprehensive.[39] The dissenting opinion of Mr. Justice Field specifically states (at page 635) that the "questions intended for argument, and actually argued and decided, relate—1st, to the validity of that provision of the act which declares that these notes shall be a legal tender in payment of debts, as applied to private debts and debts of the government contracted previous to the passage of the act; and, 2nd, to the validity of the provision as applied to similar contracts subsequently made."

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[38] When the *Legal Tender Cases* came up to the Supreme Court for consideration, the Court made the following order:

"That Mr. Potter and the Attorney-General be heard in these cases upon the following questions:

"1. Is the act of Congress known as the legal tender act constitutional as to contracts made before its passage?

"2. Is it valid as applicable to transactions since its passage?"

Mr. Justice Strong, writing for the Court, states the following at the beginning of his opinion (page 529):

"The controlling questions in these cases are the following: Are the Acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment?"

[39] See pages 530, 539, and 540. See also *Savage's Case*, 8 Ct. Cl. 545 (1872); affd. 92 U. S. 382 (1875) on grounds not material here.

(ii) *Aside from the Legal Tender Cases, the decisions of this Court upon the exercise by the Congress and by the legislatures of the various States of powers other than the monetary powers sustain the proposition that the Joint Resolution does not constitute a deprivation of property without due process of law.*

Public, as well as private, obligations may be affected as a result of action taken within the Federal police power or some other paramount power. *Lynch* v. *United States*, 292 U. S. 571, 579.[40]

The contractual rights of creditors and duties of debtors are the rights and duties recognized and enforced by the law. "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order * * *" (*Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 435). This is no less true in a case where one of the parties to the contract may, in its governmental capacity, exercise the reserved sovereign power. *Horowitz* v. *United States*, 267 U. S. 458.

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[40] It is noteworthy that the cases cited by the Court to sustain the proposition that the due-process clause prohibited the United States from annulling the policies of War Risk Insurance "unless, indeed, the action taken falls within the federal police power or some other paramount power" are cases involving private contracts or property rights, affected by State as well as Federal legislation.

There is no deprivation of property within the meaning of the 5th or 14th Amendments when a contract with the Government is affected by a statute enacted in the exercise of a paramount power. The cases which have upheld such action by the State legislatures, as applied to state obligations,[41] go far to establish the propriety of similar action by the Congress, particularly as the Congress is not restrained by the more specific

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[41] In the exercise of the police power the States have been permitted:
(1) to compel railroads to conform their tracks to street grades, and to build and repair viaducts over tracks, although the railroad charters when originally granted or other contracts between the State and the railroad did not require the performance of these acts: *Atlantic Coast Line Railroad Company* v. *Goldsboro*, 232 U. S. 548; *C. B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57;
(2) to invalidate the charter of a lottery company, although that company had paid substantial consideration therefor; *Stone* v. *Mississippi*, 101 U. S. 814; and
(3) to pass legislation which had as its effect the termination prior to maturity of an exclusive grant to a company to maintain slaughter houses in New Orleans; *Butchers Union Company* v. *Crescent City*, 111 U. S. 746.

This Court has held "that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety", sustaining State legislation enacted for such a purpose, notwithstanding its effect upon property rights. *C. B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592. In this case the Court upheld a statute under which the Commissioners required the Railroad Company to remove a bridge and a culvert which constituted an obstruction to a proposed drainage project. See also *Chicago and Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67.

limitations of an impairment-of-contract clause. See brief in cases No. 471 and No. 472, page 91.

The Court has very recently stated in *Home Building & Loan Ass'n* v. *Blaisdell, supra* (p. 437), that:

> The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.

Not only has this Court held that State legislation may affect contracts to which the State is a party, notwithstanding a failure to reserve the right to legislate with respect to the contract (*Chicago and Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67), but decisions of this Court have established a principle that legislative powers cannot be expressly contracted away. In *Newton* v. *Commissioners*, 100 U. S. 548, and *Illinois Central Railway* v. *Illinois*, 146 U. S. 387,[42] the Court

[42] Other cases sustaining State Statutes revoking prior legislative attempts to bargain away authority entrusted to the legislatures are collected in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 436.

See also *Denver & R. G. R. R. Co.* v. *Denver*, 250 U. S. 241; *Stone* v. *Mississippi*, 101 U. S. 814; *N. Y. & N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556; *Boyd* v. *Alabama*, 94 U. S. 645; *Straus* v. *American Publishers' Ass'n*, 231 U. S. 222. 243; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 463; *North American Co.* v. *United States*, 171 U. S. 110, 137.

James Parker Hall, in *American Law and Procedure*, Volume XII, *Constitutional Law*, pages 242, 243, states as follows:

"From these decisions and dicta it appears that the subjects concerning which a state may not irrevocably contract

sustained subsequent legislation having the effect of abrogating rights conferred by earlier legislation. In the *Newton* case the legislature had entered into an agreement to establish the county seat in a community, conditioned upon the performance of certain acts by that community. After these acts were performed, legislation was enacted providing for the removal of the county seat. In upholding that statute this Court declared at page 559:[43]

> They involve *public interests,* and legislative acts concerning them are necessarily *public laws.* Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of

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away its governmental powers are considerably more extensive than the public health, morals, and safety. Probably the doctrine is or will come to be that no state may make an irrevocable contract substantially impairing its governmental powers in respect to any matter seriously affecting the public welfare."

[43] In the *Illinois case* the Court sustained legislation revoking a prior grant to the Illinois Central Railway of ownership of submerged lands in the harbor of Chicago. In the course of its opinion the Court stated at page 460:

"* * * The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. * * *"

> enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

There has been similar recognition that the Congress does not violate the due process clause of the Fifth Amendment by legislation reasonably calculated to achieve the objects entrusted to it even though directly or incidentally affecting public as well as private contract rights.[44] See also cases cited on pages 92 to 96 of the brief in cases No. 471 and No. 472. The principles applied by this Court to State legislation affecting public as well as private obligations have been applied equally to Federal legislation. One Congress can no more convey or contract away the legislative powers intrusted by the Constitution so as to restrict the exercise of those powers by a subsequent Congress than can a State legislature.[45]

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[44] See *Northern Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583; *Calhoun* v. *Massie*, 253 U. S. 170; *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453 (1905); *C., B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561 (1906); *C. & A. R. R. Co.* v. *Tranbarger*, 238 U. S. 67; *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 437; *Chicago, Burlington & c R'd* v. *Chicago*, 166 U. S. 226, 255; *The Legal Tender Cases*, 12 Wall. 457, 551, 552.

[45] See *Lynch* v. *United States*, 292 U. S. 571, 579; *North American Co.* v. *United States*, 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 463.

To summarize, it is submitted that the Joint Resolution as applied to the claimant's bond does not violate the Fifth Amendment because:

(1) The *Legal Tender Cases* are a precedent directly in point;

(2) A statute which is a valid exercise of a paramount power of Congress does not violate the due-process clause of the Fifth Amendment even though the legislation may abrogate or impair rights arising under a contract with the Government. And as a corollary, since earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce, the gold clause in Government bonds may be abrogated by the 73d Congress when it concludes that the continued validity of such gold clauses will impair and restrict the exercise of such powers.

From the point of view of justice and equity, claimant is receiving for his bond all that he is entitled to receive from the Government. The purchasing power of the dollar on June 5, 1933, and on April 15, 1934, when claimant's bond was called, and at the present time is far greater than the purchasing power of the dollar that the Government received when it issued the Liberty bonds. (See the chart taken from The Annalist of December 14, 1934, reprinted in Appendix A, p. 92.)

When claimant demands $16,931.25 for his $10,000 Liberty bond, he is not asking the Government to

pay him what the Government actually received for the bond. He is not asking for payment of an equivalent amount; he is asking for a windfall. He is asking for more than was given to the person owning gold coin, gold bullion, and gold certificates. He is asking to be treated differently from all those persons who hold coin and currency that the Government agreed to redeem in gold at the old standard of value and which are not being so redeemed. He is asking to be treated differently from the owners of Government gold-clause obligations which matured prior to the reduction of the gold content of the dollar.[46]

B. The Joint Resolution does not violate Section 4 of the Fourteenth Amendment

The claimant contends that the Joint Resolution is "a direct violation of Section 4 of the Fourteenth Amendment." (Brief, page 17.) This section reads as follows:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State

[46] By January 31, 1934, the outstanding Government gold-clause obligations were about $4,000,000,000 less than were outstanding on May 31, 1933. (Figures obtained from the United States Treasury Preliminary Statement of the Public Debt, January 31, 1934.)

> shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claims for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

It seems evident that the Joint Resolution does not violate the foregoing section. That there has been no questioning of the validity of the public debt is a conclusion that inevitably follows even upon slight consideration of the meaning attached to the words "validity" and "debt", as used in the Fourteenth Amendment.

The Joint Resolution does not question the validity of the Government's indebtedness to the claimant. The word "validity" refers to the essential existence of the obligation. That the word was so used in the Amendment is shown by its use in Section 4 in contrast to the phrase "illegal and void." It was said to have been feared by the party in power when this Section was recommended to the States that the national debt incurred during the Civil War might on some future occasion be dealt with as the second sentence of the section dealt with the debt incurred by the Confederate States.

The legislative history of Section 4 likewise supports the view that the Congress intended the phrase to refer to a complete repudiation of the

public debt.[47] The first proposal of the historically famous Joint Committee on Reconstruction was that "Neither the United States nor any state shall assume or pay any debt or obligation already incurred or which may hereafter be incurred in aid of insurrection * * *." The proposed amendment made no reference to the Federal debt until Senator Wade offered an amendment adding "The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union * * * shall be inviolable." In support of this, Senator Wade said: "* * * my amendment prohibits and renders null and void all obligations incurred in rebellion * * * but then my amendment goes to another branch of this business almost as essential as that. It puts the debt incurred in the Civil War on our part under the guardianship of the Constitution of the United States so that a Congress cannot repudiate it.

It has been shown at pages 35, 36, and 50–55 that the Joint Resolution involves the same principles as the Legal Tender Acts. It "questions" the "validity" of the public debt no more and no less than

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[47] A brief legislative history of section 4 of the Fourteenth Amendment with citation of the sources is set out in the Appendix A (*infra*, page 85 to 92). See also the article cited by claimant: "A Forgotten Section of the Fourteenth Amendment", by Phanor J. Eder, 19 Cornell Law Quarterly 1 (1933).

those Acts did. The principal of some of the public debt not expressly payable in coin became payable, by the Legal Tender Acts, in greenbacks alternatively with coin. Yet nowhere in the *Legal Tender Cases, Hepburn* v. *Griswold, Juilliard* v. *Greenman, Bronson* v. *Rodes, Trebilcock* v. *Wilson, Butler* v. *Horwitz* or in any of the other cases involving the validity or the interpretation of the Legal Tender Acts as applied to public or private obligations is any reference whatsoever made to section 4 of the Fourteenth Amendment although it was adopted contemporaneously with or only a comparatively short time prior to the argument and consideration of the cases.[48]

The absence of any reference to Section 4 of the Fourteenth Amendment in any case involving the question of the constitutionality or interpretation of the Legal Tender Acts tends to indicate the fact that no one considered that the validity of a debt was questioned by changing the medium of payment.[49]

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[48] It may be true that section 4 of the Fourteenth Amendment would not have the effect of invalidating legislation theretofore enacted. Nevertheless, if it had been thought that the Legal Tender Acts questioned the validity of the public debt, some reference by way of dictum or otherwise, would surely have been made to a provision of the Constitution so recently enacted.

[49] The claimant misconceives the purpose of the Act of March 18, 1869 (16 Stat. 1). That Act was not a legislative interpretation of Section 4 of the Fourteenth Amend-

The word "debt" as used in Section 4 of the Fourteenth Amendment is not to be construed as including every provision contained in or made with respect to an obligation of the United States. The gold clause, whether construed to prescribe the

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ment. The 1869 Act was passed not because anyone doubted the validity of the public debt of the United States but because a dispute had arisen as to whether the principal of Federal obligations was payable in coin or in United States notes. One group contended that the obligation was to pay coin so long as the bonds did not specifically state that they were to be payable in lawful money; and the other group contended that the obligations were to be payable in greenbacks unless the obligations expressly provided that they were to be payable in coin. See Dewey, *Financial History of the United States* (11th Ed.), Section 148. The Act of 1869 fixed the obligation of the United States as one to make payment of certain obligations in coin or its equivalent unless the obligation expressly permitted payment in lawful money.

Moreover, it will be remembered that the Act of 1869 was passed at a time when the dual monetary system existed and when there was a disparity in value between the coin and the paper dollar. If the Congress had reduced the content of coins after the passage of the Act of 1869, there is nothing in that Act which would have precluded the Congress from paying coin obligations in these new coins. The court in the *Legal Tender Cases* (12 Wall. 457, 551) recognized that payment of coin obligations in coins, the content of which had been reduced after the obligation was incurred, did not constitute an impairment of the contract or a violation of the Fifth Amendment. If that is so, payment of such coins certainly would not constitute a questioning of the validity of a debt.

Similarly, if after the content of the coins was reduced, such coins were equal in value to an equal face amount of

mode or measure of payment, is a provision aside from the basic "debt."[50]

The "obligation" may include many collateral engagements including the gold clause, but the "sum of money due" is the debt. The public debt is the money borrowed on the credit of the United States; indeed, the Constitutional authority to in-

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other currency, there is nothing in the Act of 1869 which would limit the right of the Congress to pay paper money for obligations in lieu of an equal face amount of such coins.

On June 5, 1933, all the coins and currencies of the United States were at a parity of value with each other and consequently the equivalent of each other. The Act of 1869 is without significance in a monetary system where coin and paper money are maintained at a parity of value.

It should also be pointed out that no reference was made to Section 4 of the Fourteenth Amendment, during the course of the Congressional debate on the Act of 1869, except one statement by Senator Sprague which has no significance in the case at bar. See The Cong. Globe, March 15, 1869, pages 64, 66. Nor is there anything in Dewey's *Financial History of the United States* (11th Ed.) Section 148, which indicates any relationship whatever between the Act of 1869 and Section 4 of the 14th Amendment.

[50] It is interesting to note that "debts" was construed by this Court (at the time of the passage of the Fourteenth Amendment) as used in the Legal Tender Acts not to embrace the whole of the obligation stipulating for payment of the debt in coin. *Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258; *Dewing* v. *Sears*, 11 Wall. 379. See also *Maryland* v. *R. R. Co.*, 22 Wall. 105, 108, in which this court distinguished between the debt, i. e., the promise to pay, and the additional stipulation as to the medium of payment.

cur the public debt is "to borrow money on the credit of the United States." Legislation enacted in the exercise of another paramount Congressional power "to coin money and regulate the value thereof" may affect or even question the validity of collateral agreements without in any sense questioning the validity of the public debt itself.[51]

Whatever construction may be given to the words "validity" and "debt", it can scarcely be contended that the limitation placed upon Congress by Section 4 of the Fourteenth Amendment is more stringent than the limitation placed upon the States in the impairment-of-contracts clause. Reference has been made above to the decisions of this Court permitting State legislatures to affect contracts in the course of the exercise of a police or other paramount power notwithstanding its effect upon contracts. (See pages 55 to 61, *supra.*) In the same way the restrictions of Section 4 of the Fourteenth Amendment are to be understood not

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[51] Historians who have considered Section 4 limits its concept of public debt to that public debt existing at the time of the adoption of the amendment. (Burdick, *The Law of the American Constitution*, Section 228; Dunning, *Essays on the Civil War and Reconstruction* (1931), 118; Eriksson & Rowe, *American Constitutional History* (1933), 301; Flack, *The Adoption of the Fourteenth Amendment* (1908), 133; Magruder, *The Constitution* (1933), 328; Story, *Constitution*, 5th Ed., Section 1965; Watson, *The Constitution of the United States* (1910), 1657; 2 Blaine, "*Twenty Years of Congress*", 190; Guthrie, *The Fourteenth Amendment* (1898), 17. See also 44 Yale Law Journal 53, 85.)

to prevent the appropriate exercise of the paramount powers of the Congress.

5. The Joint Resolution may not be attacked as a taking of private property without just compensation

The claimant states at page 42 of his brief:

> Even if the Joint Resolution of June 5, 1933, insofar as it required generally the discharge of gold or gold-value obligations in legal tender currency, should be held to be a valid exercise of delegated power, the *direct* repudiation by it therein of claimant's existing contract with defendant constitutes a "taking" of claimant's property thereunder, which, even under the exercise of a paramount power, implies an agreement in fact to pay just compensation therefor, protected by the Fifth Amendment.

This Court has repeatedly held that neither the Federal nor a State Government need make compensation to the contracting party for a deprivation or taking of property as the consequence of a legislative act which constitutes a valid exercise of Federal or State paramount power. (See cases cited *supra*, page 59.)

While the claimant's petition frames his cause of action as one for breach of an express contract, he avers as a conclusion of law that the effect of the Joint Resolution is to deprive him of his property without due process of law. In his brief, page 42, he argues that the Joint Resolution has no substantial relation to the exercise of any Congres-

sional power and therefore its effect is to deprive him of his property without due process. Point 3, page 42, of his brief charges that the Joint Resolution constitutes a repudiation of the Government's contract and thus, in his view, amounts to a taking of his property without the payment of just compensation.

It has already been remarked that the claimant confuses the due process and the just compensation clauses of the Fifth Amendment. We believe that since the only case presented in the record is for an alleged breach of an express contract, the claimant will not be heard to urge that he has not received just compensation for any taking of his property. There is no basis in fact for the argument that there has been a taking of the claimant's private property, from which an agreement to pay compensation implied either in law or in fact could arise. We have already pointed out that the due process clause is inapplicable, because a deprivation of property cannot give rise to a contract implied in fact. The Court of Claims has jurisdiction only of contracts implied in fact and not of those implied in law. (*United States* v. *Minnesota Investment Co.*, 271 U. S. 212.)

The claimant's reasoning in support of his contention that his property has been taken, involves a *non sequitur*. He argues that his private property has been taken, and that he is entitled to just compensation, in view of the provisions of the Fifth Amendment. He then asserts that the com-

pensation must be measured as of April 15, 1934, when his bond was called for payment. (See Claimant's Brief, p. 16.) That conclusion is clearly fallacious. Even on the claimant's theory, his bond was not taken. He still has his bond and may collect its face amount at any time that he chooses to accept it. If anything was taken, it was the intangible right to receive gold coin in preference to other currency. The taking, if it may be construed as such, was accomplished by the Joint Resolution. Therefore, the taking was not on April 15, 1934, but on June 5, 1933. Consequently, the value of the private property taken must be ascertained as of June 5, 1933. What then was this intangible right worth on that date? Clearly, it had absolutely no value, for the bond was worth just as much with that right withdrawn or abrogated as it was worth when that provision still formed a part of the obligation. This is conclusively demonstrated by the fact that there was no drop in the market price of the bond upon the passage of the resolution. The bond continued to be worth just as much on June 6th and immediately thereafter as it had been worth on June 4th. These facts are convincingly shown by the table on page 71.

The claimant makes no allegation that his bonds depreciated in value either on June 5, 1933, or since that time. The conclusion is inescapable that even on the theory of a taking, the property taken was

an intangible right which had no value, and consequently no compensation is due therefor.

Fourth Liberty Loan—4¼-percent bond, Series of 1933–38—daily closing prices, New York Stock Exchange

[In terms of 32nds]

[Claimant's bond was one of this series]

1933:	
May 15	102–28
16	102–28
17	102–28
18	102–28
19	102–29
20	103
22	103– 2
23	103– 4
24	103– 5
25	103– 4
26	103– 5
27	103– 4
29	103– 5
30	
31	103– 2
June 1	103– 2
2	103– 3
3	103
5	103– 2
6	103– 1
7	103
8	103
9	103
10	102–30
12	102–31
13	103– 1
14	103– 1
15	103– 2

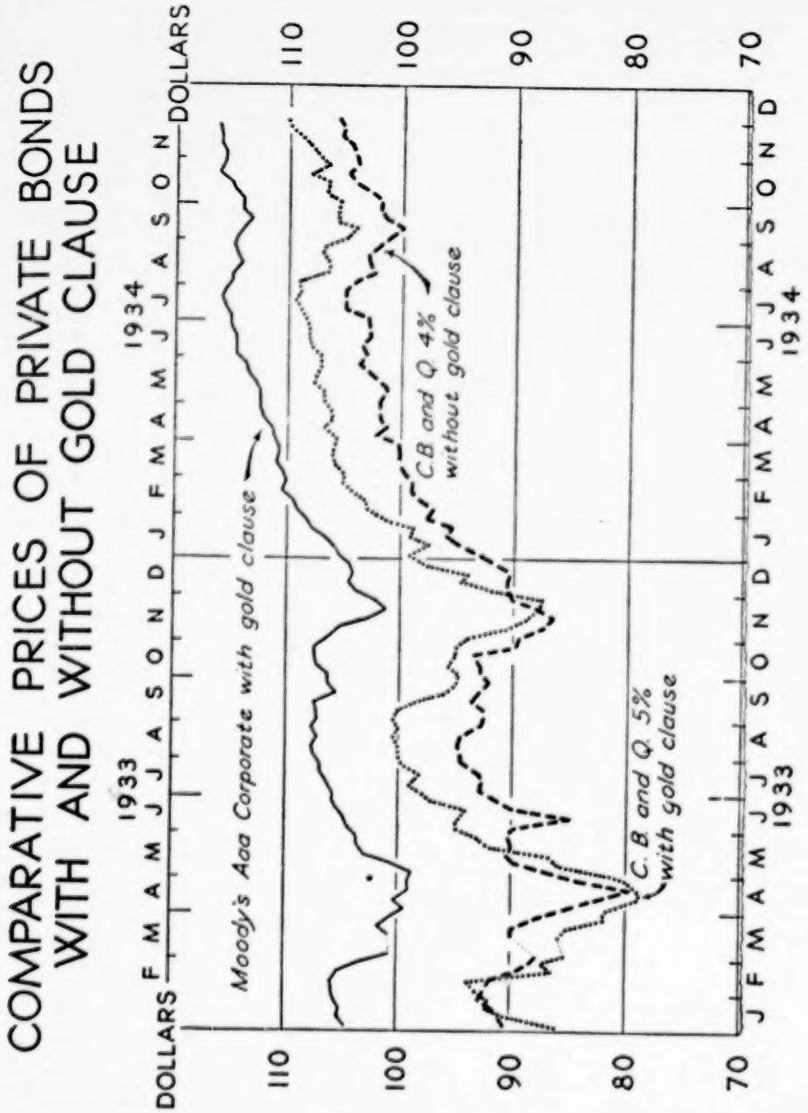
Treasury Department, Division of Research and Statistics, Dec. 31, 1934.

But assuming that the claimant is correct in his contention that the Joint Resolution constitutes a taking of his property and that there is an implied-in-fact agreement to pay just compensation therefor, it is submitted that the Government has provided just compensation for the claimant's property right.

In *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326, this Court stated that where private property is appropriated for public use "a full and exact equivalent for it" should be returned to the owner. In *Olson* v. *United States,* 292 U. S. 246, 255, this Court held "that equivalent is the market value of the property at the time of taking * * *. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."

It has not been possible to set forth a comparison of Federal gold-clause and non-gold-clause obligations for a period beginning before June 5, 1933, because all Federal obligations were considered to have the gold clause provided for in the Act of 1910 (36 Stat. 192). As the effect of the Joint Resolution was the same on private as well as public gold-clause obligations, a comparison of the market price of private gold-clause and non-gold-clause

obligations is equally significant. In the following chart the comparative market value of two bonds of the Chicago, Burlington and Quincy Railroad



are plotted. One of the bonds, dated 1908, promises to make payment of principal and interest "in lawful money." The other bond contains the con-

ventional gold clause. It will be noted that the relative value of these bonds remains substantially the same throughout 1933 and 1934. For purposes of relating this chart to the one appearing at page 28, the composite market price of the 30 Aaa corporation bonds has likewise been plotted. All of these bonds except the Chicago, Burlington and Quincy 4%-bond contain a gold clause.[52]

Moreover, if claimant had on June 5 received gold coin for his Liberty bond, he would have been required by the Act of March 9, 1933, and the Executive Orders issued pursuant thereto, to deliver the gold coin to a Federal Reserve bank, or, under the order of the Secretary of the Treasury, dated December 28, 1933, to the Treasurer of the United States in exchange for other coin or currency of the United States of an equivalent amount.[53] On June 5, 1933, there was no disparity of value in this

[52] This chart was prepared by the Division of Research and Statistics, United States Treasury Department and is based upon the tables collected in Moody's Investment Survey (1933 and 1934), and the Annalist (1933 and 1934). The non-gold-clause bond is a bond of the Chicago, Burlington and Quincy Railroad, maturing in 1958, bearing 4% interest, and issued under an indenture, dated March 2, 1908. This is the only non-gold-clause bond included among Moody's 30 Aaa corporate bonds. The gold clause bond is issued by the same corporation under an indenture, dated February 1, 1921, matures in 1971, and bears 5% interest. It should be noted that the Moody Aaa Index is based upon industrial and public-utility issues as well as railroads.

[53] See brief, in cases No. 471 and No. 472, pages 101 to 114.

country between gold coin and other money of the United States.[54] Nor was the value of gold bullion in this country in excess of $20.67 an ounce.[55]

An assumption that the market price of gold bullion in foreign countries was greater than its value in the United States does not sustain the claimant's contention. He was in no position to secure any asserted "world price" for any gold held or received by him in the United States, since the Executive Orders promulgated under the Act of March 9, 1933, prohibited the export of gold coin from the United States.[56] Such prohibition is clearly constitutional. *Ling Su Fan* v. *United States*, 218 U. S. 302. Claimant does not contest the validity of any of the statutes or orders relating to gold except the Joint Resolution.

Assuming claimant's theory of a taking to be sound, there is no basis for his contention that compensation must be made for the increased value of property accruing after the taking. *Olson* v. *United States*, 292 U. S. 246, and *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123.

The power to regulate the value of money is conferred by the Constitution upon the Congress. The value of money and conversely the monetary value of the metals in terms of which money is defined is for the Congress to determine. Accordingly, the

[54] See brief, in cases No. 471 and No. 472, pages 25 to 28 and 101 to 114.

[55] See brief, in cases No. 471 and No. 472, pages 101 to 114.

[56] See brief, in cases No. 471 and No. 472, pages 101 to 114.

usual rule that there must be a judicial determination of the value of property taken by the Government (see *Monongahela Navigation Company* v. *United States*, 148 U. S. 312) is inapplicable to the case of a "taking" by substituting payment in one form of money for another. In such a case the court must take as its yardstick of value the Congressional determination of the value of the money "taken" by the Government.

It is also evident that the claimant confuses destruction of property with a taking of private property for public use. Where private property has been taken for public use, a contract implied in fact arises for the payment of just compensation, and suit for just compensation may then be maintained in the Court of Claims. On the other hand, if the Government destroys property without taking it for public use, there is no contract implied in fact to pay compensation. Inasmuch, however, as the jurisdiction of the Court of Claims is limited to actions on contracts express or implied in fact, that tribunal may not entertain a suit for damages caused by the destruction of property. To abrogate a contract right is not to take private property for public use. To frustrate a contract is not to appropriate it. These principles were very clearly formulated and applied in *Omnia Commercial Company* v. *United States*, 261 U. S. 502, 508, 513:

> The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*,

166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, *Bowditch* v. *Boston*, 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393. There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property.

* * * * *

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government.

The Government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the per-

formance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

6. The United States as a contractor is not liable to respond in damages in the Court of Claims for any breach of its proprietary and corporate contracts due to its public and general acts as a sovereign

It is well settled that the United States does not, as a general rule, secure by reason of its sovereignty advantages in contracts entered into in its corporate or proprietary capacity.[58] As a corollary, the only claims against the United States which the Congress has agreed may be the subject matter of suit in the Court of Claims are those "in which their sovereignty is nowise involved", that is, contracts entered into in its corporate or proprietary capacity.[59]

Assuming that a Liberty bond is a corporate or proprietary contract, it must follow, conversely, that the United States should not, in its corporate or proprietary capacity, be placed at a disadvantage by reason of its sovereignty.

---

[58] *United States* v. *Bank of Metropolis*, 15 Pet. 377, 391, 392 (1842); *Corliss Company* v. *United States*, 10 Ct. Cls. 494, 502 (1875), aff'd 91 U. S. 321 (1876); *Reading Steel Casting Company* v. *United States*, 268 U. S. 186, 188 (1925).

[59] *United States* v. *State Bank*, 96 U. S. 30, 36. The Court of Claims has jurisdiction only of suits on contracts in the true sense of the word as it applies to agreements between private parties. *Jones* v. *United States*, 1 Ct. Cls. 383.

In *Horowitz* v. *United States,* 267 U. S. 458 (1925), a case which arose in the Court of Claims, suit was brought on a contract to purchase goods from the New York Salvage Board and damages were claimed because of delay due to an embargo on shipments of freight laid by the United States Railroad Administration.

This Court stated in its opinion (p. 461):

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming* v. *United States,* 1 Ct. Cls. 190, 191; *Jones* v. *United States,* 1 Ct. Cls. 383, 384; *Wilson* v. *United States,* 11 Ct. Cls. 513, 520. In the *Jones Case, supra,* the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons * * *. In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for

> the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

It is established, therefore, that the United States, has in regard to its contracts, a dual capacity, and its liabilities as a contractor are divorced from its acts as a sovereign. It cannot be held liable in the Court of Claims for any variance in performance of an obligation due to a public and general act of the Congress. The Joint Resolution is such an Act.

II

SECTION 1 OF THE JOINT RESOLUTION OF JUNE 5, 1933, HAS THE EFFECT OF WITHDRAWING THE CONSENT OF THE UNITED STATES TO BE SUED ON GOLD CLAUSES

In *Lynch* v. *United States,* 292 U. S. 571, 580, this Court held that the withdrawal by the Congress of a right to sue the United States is not a violation of any constitutional right. Upon this point Mr. Justice Brandeis wrote as follows:

> Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi,* ante, p. 313. "The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no

> pretensions to compulsive force. They confer no right of action independent of the sovereign will." The rule that the United States may not be sued without its consent is all embracing.
>
> * * * * *
>
> Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. *DeGroot* v. *United States,* 5 Wall. 419, 432. * * *

In the *Lynch* case the Court further pointed out that a mere withdrawal of the consent to sue on a contract would not imply repudiation (page 582).

Section 1 of the Joint Resolution of June 5, 1933, is in effect a withdrawal by the United States of any consent that may have theretofore been given to be sued on gold clauses in Government obligations.

The Joint Resolution of June 5, 1933, declares every provision contained in, or made with respect to, any obligation which purports to give the obligee a right to require payment in gold, to be against public policy. It further provides that every such obligation shall be discharged upon payment, dollar for dollar, in any coin or currency which at the

time of payment is legal tender for public and private debts. Clearly this is a declaration that as to Government bonds containing a gold clause, the gold clause would not be thereafter recognized. It is immaterial that the Resolution does not state in so many words that no suit shall be brought against the United States on a gold clause, or that any consent previously given on the part of the United States to be sued, is withdrawn as to gold clauses. The intent of Congress that no such suits should be maintained is clear.

The history of the Resolution inescapably leads to this conclusion. Acting under the provisions of Section 5 (a) of the Act of October 6, 1917, as amended, the President issued a proclamation declaring a bank holiday. On March 6, 1933, the Secretary of the Treasury issued instructions to the Treasurer of the United States and to the Director of the Mint, both orders being approved by the President. The Congress on March 9, 1933, approved and confirmed the steps thus taken. As a result thereof, there was a complete suspension of the redemption of currency in gold.

Obviously, if currency was not to be redeemed in gold, it was equally necessary, in fact, indispensable, that Government bonds should likewise not be paid in gold. To dispel any possible doubt on that question Section 1 of the Joint Resolution was enacted. One of its purposes was to forestall any attempt to enforce the gold clause in Government bonds. To argue that the right to sue on the gold

clause still remained would be to frustrate the will and the intent of the Congress and to subject the exercise of a sovereign power of Government as distinct from an act in its proprietary capacity to adjudication by the Court of Claims.

A serious doubt may exist in this case as to the right of the Court of Claims to adjudicate a claim which depends on its overturning an Act of the Congress. Since, however, it has not done so but has certified questions involving constitutionality to this Court, and since the Government and other parties in interest are anxious for a decision on the validity of the Joint Resolution, applying to both public and private obligations, it is deemed permissible to assume that this Court will not withhold its answer because of any doubt of authority in the Court of Claims to certify such questions. In this regard the course pursued here is not different from that adopted in *Booth* v. *United States,* 291 U. S. 339.

CONCLUSION

It is respectfully submitted that both questions certified by the Court of Claims should be answered in the negative.

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JANUARY 1935.

APPENDIX A

Brief History of Section 4 of the Fourteenth Amendment to the Constitution

On April 30, 1866, the Joint Committee on Reconstruction reported to the Senate and the House of Representatives a joint resolution proposing an amendment to the Constitution of the United States, 71 Cong. Globe, 2265 and 2286. Section 4 of the proposed amendment provided as follows:

> Neither the United States nor any state shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

This resolution was adopted by the House on May 10, 1866 (71 Cong. Globe, 2545).

On May 23, 1866, Senator Wade introduced in the Senate some amendments to the foregoing joint resolution. He offered the following in place of Section 4 of the joint resolution:

> SEC. 3. The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for payment of bounties or pensions incident

> to such war and provided for by law, shall be inviolable. But debts or obligations which have been or may hereafter be incurred in aid of insurrection or of war against the United States, and claims of compensation for loss of involuntary service or labor, shall not be assumed or paid by any State nor by the United States. (71 Cong. Globe, 2768.)

Senator Wade said in support of his amendments:

> In the next place, my amendment prohibits and renders null and void all obligations incurred in rebellion and insurrection against the United States or for the purpose of aiding rebellion or insurrection; and in that particular it is precisely the same as the corresponding section of the original proposition which was so eloquently defended and enforced by the Senator from Michigan. I agree with all that he said on that subject, and the proposition reported by his committee and the one I have submitted are the same in that respect; but then my amendment goes to another branch of this business almost as essential as that. It puts the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States so that a Congress cannot repudiate it. (71 Cong. Globe, 2769.)

On May 29, 1866, Senator Howard of Michigan introduced in the Senate certain amendments which were decided upon in the caucus of Republican Senators which had met for a five-day period be-

ginning May 24, 1866. Senator Howard's statement with respect to section 4 of the Fourteenth Amendment is as follows (71 Cong. Globe, 2869):

> The obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate.
>
> Section four, as it now stands, will be changed to section five, and I propose to amend that section as follows: strike out the word "already", in line thirty-four, and also the words "or which may hereafter be incurred," in line thirty-five, * * *.[60]

It should be noted that Senator Howard's amendments struck out the words "which may hereafter be incurred" from the provision dealing with the debt incurred by the South in prosecuting the Civil War and also refrained from accepting Senator Wade's suggestion to include similar words in the section dealing with the public debt of the United States.

On June 4, 1866, the Senate agreed to the amendments proposed by Senator Howard (72 Cong. Globe, 2941). Thereupon Senator Fessenden stated:

> There is a little obscurity, or, at any rate, the expression in section four might be construed to go further than was intended, and

[60] Senator Wade withdrew his amendment after Senator Howard introduced his amendments.

> I have rather come to the conclusion that it was best to put sections four and five in one single section; and I ask the Chair, as section four has been adopted and also the amendments to section five, if it will be at any time in order to strike out both and insert a substitute for the two sections. (72 Cong. Globe, 2941.)

The presiding officer agreed that Senator Fessenden's amendments would come up in the Senate in their regular order. On June 6, Senator Clark, as a substitute for the 4th and 5th sections of the Howard amendment, offered the amendment of the Joint Committee on Reconstruction (of which Senator Fessenden was the chairman). This amendment consisted of one section which is the same as Section 4 of the Fourteenth Amendment as finally adopted. It was taken up for consideration on June 8. The following colloquy constitutes the entire discussion concerning such amendment:

> Mr. JOHNSON. I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the same.
>
> Mr. CLARK. The result is the same.
>
> The amendment was agreed to. (72 Cong. Globe, 3040).[61]

---

[61] The claimant, at page 20, of his brief states:

"Had the Howard draft of Section 4 been finally adopted, it might have been claimed that the Amendment applied only to then existing obligations of the United States. The change from the form of the Howard amendment to the present form is, however, highly significant and was clearly intended to formulate a constitutional principle applicable

The resolution, as amended by the Senate, was passed by the House of Representatives on June 13, 1866 (72 Cong. Globe, 3149).

The claimant, on page 20 of his brief, states as follows:

> An amendment in the same form as Mr. Howard's (supra, p. 19) limiting its application to debts incurred in the Civil War, *was rejected.* (Italics his.)

Presumably the claimant means to suggest that when the Senate rejected this amendment proposed by Senator Doolittle it was specifically rejecting the words employed in Senator Howard's amendment. This is not borne out by the facts. At the time Senator Howard's amendment had been adopted and before Senator Clark introduced his amendment on June 6, Senator Doolittle offered an amendment. He stated:

> The effect of my proposition is that each of these sections shall be submitted as sepa-

---

to all public debt, future as well as present." The significance of the change from the Howard amendment to the amendment as finally adopted is shown by the colloquy between Mr. Johnson and Mr. Clark, quoted *supra*.

Furthermore, the claimant appears to misconstrue the minority report of the Joint Committee on Reconstruction. The words "no matter how contracted" in the quotation appearing on page 20 of claimant's brief is not to be construed as meaning "when contracted", but refers to types of governmental debts theretofore incurred, such as pensions, bounties, etc.

> rate articles, to be passed upon severally. That is the effect of the amendment of which I now give notice. (72 Cong. Globe, 2991.)

Accordingly, when the Senate rejected Senator Doolittle's amendment it was because the Senate did not want to have each section submitted as a separate article, and not because the Senate did not wish to accept the language employed by Senator Howard in his amendment.

See also Kendrick, *Journal of the Joint Committee on Reconstruction,* page 319, where he states:

> In vain did Doolittle, whom the Republicans called the apostate, plead with his former associates that they allow the various sections to be sent separately to the states for ratification.

And again, at page 350, Kendrick states:

> As for section 4, it was entirely unnecessary, and since it was designed to catch votes, especially those of the soldiers, it deserved to be classified as mere political buncombe.

See also page 282 of Kendrick's Journal.

There is nothing in Kendrick's report of the testimony taken by the Joint Committee on Reconstruction or in the Congressional debate with respect to the proposed Fourteenth Amendment to indicate that anyone was thinking about the problem of paying off the national debt in green-

backs or in coin of which the content might be reduced.[62]

[62] Kendrick, *Journal of the Joint Committee on Reconstruction*, at page 282 states that 28 witnesses (apparently from the South) before the Joint Committee "declared there was a general reluctance to pay taxes and the National debt and thought that if it were paid the Confederate debt should also be paid. * * *." Kendrick also quotes, pages 283, 284, some of the testimony taken before the Joint Committee, which testimony indicates the situation to meet which the first sentence of section 4 was adopted.

"Judge John C. Underwood, of New York, whom Lincoln made federal judge of the district court in Virginia:

"Question. Let me put a hypothetical case to you. Suppose that by means of a combination with the so-called Democratic party, *alias* copperhead party, *alias* conservative party, they, the rebels, should again obtain political power in Congress, and in the executive department; suppose this to be the result of a combination between the ex-rebel party in the South and this so-called Democratic party in the North; what would be the effect of that ascendancy upon the rebel states? What measures would they resort to.

"Answer. They would attempt either to accomplish a repudiation of the National debt, or an acknowledgment of the Confederate debt, and compensation for their negroes. I think these would be their leading measures, their leading demands; and I think if either the rebel debt could be placed upon an equality with the National debt, or both could be alike repudiated, they would be satisfied. But the leading spirits would claim compensation for their negroes, and would expect to get it by such a combination.

"Homer A. Cooke, a former quartermaster in the United States Army, who had been stationed in North Carolina:

"Question. How do the ex-rebels feel about the payment of the Federal war debt? If it was left to them to vote *yes*

THE ANNALIST WEEKLY INDEX OF WHOLESALE COMMODITY PRICES
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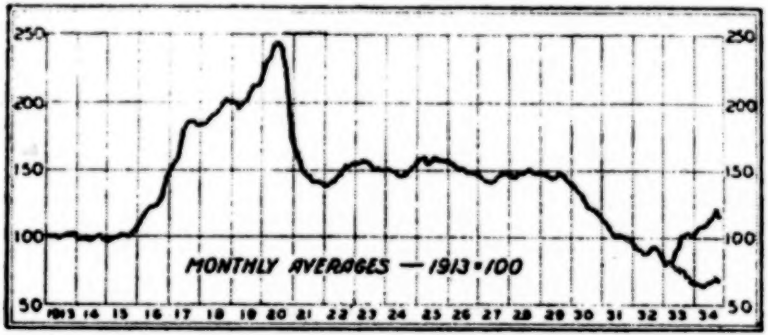

or *no* on the question of paying it, what way would they vote generally?

"Answer. They would vote *no*, without doubt.

"Question. It would not be a very close struggle?

"Answer. It would be about as unanimous as the vote in this district on the question of negro suffrage."

FILE COPY

JAN 4 1935

October Term 1934

In The Supreme Court

OF THE

United States

JOHN M. PERRY,
Petitioner,
vs.
THE UNITED STATES,
Respondent.

No. 532

Motion for Leave to File, and Brief of Amici Curiae in Support of the Contentions of The United States of America

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In The Supreme Court

OF THE

United States

JOHN M. PERRY,
Petitioner,
vs.
THE UNITED STATES,
Respondent.

No. 532

Motion for Leave to File Brief Amici Curiae in Support of the Contentions of the Unted States of America

The undersigned move for permission to file the following brief as amici curiae herein.

The question involved in the present case is whether gold clause obligations are against public policy and factually and legally impossible of performance, so that they are invalid, illegal and unenforceable and the obligors are excused from further performance; and, if not, what are the rights of the obligees (1) where the obligor is unable and/or unwilling to pay lawful money, and (2) where obligee expresses a "willingness to accept" or the obligor "offers to pay" lawful money in lieu of the specific gold coin to secure a discharge of the gold clause obligation. In other words, to clarify the last sentence of Judge Faris in Re Mo. Pac. 7 F. Supp. 1 (Nos. 471, 472 consolidated herewith) as to what are the equities under which the obligee is entitled to re-

cover under the gold clause contract declared to be and held to be against public policy, invalid, illegal, unenforceable and factually and legally impossible of performance.

The undersigned George C. Johnson appears as the attorney of record in the following cases, wherein the identical question involved in this case is presented for determination; now pending in the District Court of the United States, Southern District of California, Central Division:

1) No. 6905—James, California Bank vs. George C. Johnson (the undersigned George C. Johnson); remanded to the Municipal Court, City of Los Angeles, California, as No. 351,206.

2) No. 6957—Cosgrave. Luena H. Gwin and George C. Johnson vs. Security-First National Bank of Los Angeles (the undersigned George C. Johnson, one of plaintiffs).

3) No. 412-H and 414—Holzer. Mortgage Guarantee Co. vs. J. E. Renaud (George C. Johnson, undersigned, counsel for defendant).

4) No. 426—Cosgrave. Pacific Hotel Apartment Co., et al., vs. Leigh M. Battson, et al., George C. Johnson, counsel for plaintiffs. On Dec. 10, 1934, Judge Corgrave ordered demurrer to complaint (for Declaratory Relief) sustained without leave to amend, unless plaintiffs would amend within ten days and allege that the obligor had offered to pay lawful money. Plaintiff obligor was unable to make such allegation, as the beneficiary had never expressed any willingness to accept lawful money, or any other substitute consideration, but had directed

trustee to sell for "Cash, lawful money of the United States" and beneficiary had already purchased at said sale the property originally appraised at about $3,000,000 for $260,000, as the sole bidder, and without payment of any consideration and merely by giving credit on the promissory note under its trust deed lien of approximately $1,500,000. The plaintiffs were unable to bid and were unwilling to pay $1,500,000 lawful money for property that was thus sold at public auction and bought by the beneficiary for only $260,000!

Also a number of other cases pending and others awaiting this decision to be filed. More detail re: said cases is set forth in the following brief on pages 4 to 6.

Due to the fact that the Attorney General of the United States has requested a consolidation of all cases pending and involving the gold clause problem to be determined as a test case herein to dispose of all points involved in Public Resolution No. 10 and The Gold Reserve Act, and due to the fact that the cases before this court only involve facts where the obligor offers to pay in lawful money to secure a discharge and does not involve facts where the obligor is unable and/or unwilling to pay lawful money, though the determination of the case must necessarily involve a determination of both these points, the briefs on file will not fully present the issues where neither party changes his position by injecting "an offer to pay" or a "willingness to accept" the substitute lawful money in lieu of the specific gold coin contracted for; and the undersigned will not be afforded an opportunity otherwise to present their views in connection therewith.

The rights of the undersigned as well as those of a million other homeowners will be determined by the decision in this case, involving homes of an estimated value of many billions of dollars, through gold clause obligations contained in trust deeds and mortgages, with power of sale in case of default. The decision should also determine the rights of the mortgagees and the trustees to sell under the power of sale, and a full decision of those rights will save the cost and delay of a trial of all those issues involved and which will require a million lawsuits if the issues are not determined herein. The national crisis also requires an early determination of these rights, and justify this application.

The attorneys for the respondent and the attorneys for petioner have consented in writing to the filing of this brief by the undersigned.

The undersigned therefore request that this court permit them to file the following brief as amici curaie in the above-entitled matter.

Dated: Los Angeles, December 26, 1934.

Edward E. Gann and
George C. Johnson.
Amici Curiae.

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In The Supreme Court

OF THE

United States

JOHN M. PERRY,
Petitioner.
vs.
THE UNITED STATES,
Respondent.

No. 532

Brief of Amicus Curiae in Support of the Contentions of The United States of America

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Preliminary Statement

Applicant is not employed as counsel in any of the above entitled cases, which involve cases where the obligor has tendered lawful money in order to get a discharge, but applicant is interested in other pending cases, involving the rights of parties who are unable or unwilling to tender lawful money to get a discharge. Said cases are pending in the District Court of the United States, Southern District of California, Central

Division, at Los Angeles, and in State Courts and City Courts in Los Angeles, where trust deeds and mortgages were given on homes and properties to secure the gold clause obligation, and where the courts are enforcing the gold clause obligation where the obligor is unable or unwilling to pay lawful money.

The equities of millions of home-owners, amounting in value to many billions of dollars will be irrevocably determined by this decision of court, if the decision of this Court does not clarify the ambiguity of the concluding sentence of the opinion **In Re Mo. Pac. R. R.,** 7 F. Supp. 1, where it states that the obligee is entitled to recover in equity only, and which conclusion the trial courts are construing to mean that the obigor must pay or the obligee is entitled to recover under the terms of his original contract in lawful money.

The circumstances justify these millions of home-owners now at the end of their road to ask the Supreme Court as their last hope to declare these rights and save their homes from destruction and them from becoming a government charge. The homes are the pillars upon which this nation stands.

It is within the court's discretion to allow this application, and it is believed that the circumstances justify a prompt decision as to these vital claims and rights.

Northern Securities Co. v. U. S., 191 U. S. 555, 48 L. Ed. 299;

Green v. Biddle, 8 Wheat 17, 5 L. Ed. 551.

If the Supreme Court will extend its opinion to clarify and state the rights involved where the obligor is unable

or unwilling to pay lawful money to get a discharge, it will void considerable litigation and suffering through the loss of homes, and at least be a comfort to these formerly stable citizens who are being so gently relieved of their homes, their equities and their life-savings and reduced to a burden upon the national treasury. As the government recently announced, last year there were approximately 13,000,000 people receiving aid from the government, with an estimate of over 23,000,000 for the coming winter. The situation is desperate and growing worse and should not be augmented. Also the congestion of the U. S. Courts through trial of these half million cases will be saved the nation if these rights are clearly and promptly announced by the Supreme Court.

As Mr. Reilly said on page 4561, 73d Congressional Record, 1st Session:

> "It is inequitable for the government of the United States to permit a situation to exist whereby the debtor who borrowed a dollar several years ago must pay today, in the liquidation of his debt, a dollar having a purchasing power of at least a dollar and a half."

As Mr. Glover said, on page 4561, 73d Congressional Record, 1st Session:

> "Public Resolution No. 10 is a part of the New Deal, and a bright day for America and when the legislation is enforced there is no reason why our government should not be back on a prosperous and sound basis economically."

As Mr. Cross, p. 4541, 73d Congressional Record, 1st Session, said:

> "Listen! Let us see the equity of it. If I had loaned you $10,000 five years ago, we would and we should have assumed that conditions would remain the same and that the purchasing power of the dollars I loaned you would be paid back in dollars having the same purchasing power; but if perchance our minds met on that, then my mind never met on any proposition that the gold dollar would run amuck and multiply itself in purchasing power, nor did yours; but the gold dollar has, and is still running amuck and as a result in accordance with the letter of the law, it enables me to rob you of twice what I loaned you, and I take your property, kick you out and let you go, and yet you say that this is fair under the letter of the law?"

> "(Public Resolution No. 10) * * * is essential for the accomplishment of national recovery."
>
> *Report No. 169*, House of Representatives, 73d Congress, 1st Session, from Committee on Banking and Currency, to accompany H. J. Res. 192, Public Resolution No. 10.

The cases in which applicant is interested are as follows:

1. No. 6905—James, entitled *California Bank v. George C. Johnson* (applicant herein) *et al.*, unlawful detainer action removed from The Municipal Court, City of Los Angeles, #351,206, in which plaintiff claims it has duly sold the home of defendants under *California Civil Code*, Sec. 2924, and duly perfected its title thereto

under *California Code Civil Procedure*, Sec. 1161a, pursuant to terms of power of sale in a trust deed executed by defendants to secure payment of a promissory note for $7500.00 payable in United States gold coin when the value of the home was $20,000; and the said sale price was $1500 less than the unpaid balance, leaving a deficiency, after taking the entire home, of approximately $1500 (gold dollars) still owing. Motion to remand was granted; judgment of dispossession has been rendered, and judgment for rent of premises since sale. Defendants have lost their home on a loan that was one-third the value of the home when made, and now after the home was taken by said bank, the defendants still owe one-fifth of the original loan, or about one-fourth of the present dollar value of the home.

2. No. 6957—Cosgrave. *Luena H. Gwin, et al v. Security First National Bank of Los Angeles, et al.*, George C. Johnson, as counsel for plaintiff; for declaratory relief as to rights of parties under trust deed securing $20,000 obligation payable in United States gold coin. Value of home when loan was made $80,000; present dollar value of home less than unpaid balance. First demurrer to complaint sustained without leave to amend.

3. Nos. 412-H and 414—Cosgrave. *Mortgage Guarantee Co. v. J. E. Renaud, et al.*, George C. Johnson, counsel for defendants; action for specific enforcement of trust deed power of sale and for possession of property and collection of rents pending sale. Present owner paid $100,000 for equity on May 2, 1934, subject to $95,000 trust deed. Receiver (without notice) granted in August, 1934, and is now operating defendant's prop-

erty. Court ignoring defenses of illegality, impossibility of performance or that obligation is against public policy. Owner unable to secure lawful money with which to pay. Replacement cost of property $300,000; no present sale value. If sale is permitted, it will wipe out entire equity paid or replacement cost value, with subsequent loss to owner of $200,000, in addition to deficiency on sale up to amount of encumbrance.

4. No. 426—Cosgrave. *Pacific Hotel Apartment Co. et al. v. Leigh M. Battson, et al.*, George C. Johnson counsel for plaintiff, to declare a trust and for accounting of trustee under trust deed given to secure an obligation of $1,325,000.00, payable in United States gold coin. Value of property when lien given, $3,000,000; present sale value, none. Owner unable to borrow lawful money with which to pay. Temporary restraining order stopping sale granted by Judge Paul McCormick. Affidavit of personal bias and prejudice filed against Judge Cosgrave, held by him insufficient and he then set aside restraining order and permitted sale to proceed. Sale had on November 16, 1934, and no bidders. Sold to note holder for $260,000, by allowing credit on notes; no cash paid. Result: Owner's $1,500,000 investment wiped out and in addition now faces a deficiency claim of over $1,000,000 on a lien that originally represented the value of less than 50% of the total $3,000,000 investment.

One of claimants to the property involved in said action No. 426-Cosgrave, has since filed an Interpleader action, #380,408, in the Superior Court of the State of California, Los Angeles County, against applicant's

clients and approximately 200 defendant claimants, calling upon them to litigate their rights. This will necessitate 200 attorneys, 40,000 cross-complaints, 40,000 demurrers, 40,000 answers, and 40,000 judgments in the State trial court and if removed to the Federal court will necessitate similar proceedings there. And then the appeals!

5. Applicant is counsel in a number of other cases involving similar equity rights, and the local courts are enforcing the gold clause obligation and permitting sales for lawful money where the obligor cannot or does not pay.

Statement of Case

What are the rights and obligations of the various parties to a gold clause obligation under the provisions of Public Resolution No. 10 and The Gold Reserve Act of 1934, where the obligor is unable or unwilling to tender lawful money to secure a discharge?

Under the panic he is unable to borrow lawful money; and even if able to, he may be unwilling to pay lawful money to get a discharge, due to three causes: (1) faith in the acts of Congress and an unwillingness to assist the obligee to collect his pound of flesh; (2) that the property today is not worth the value of the gold obligation; or (3) where the only desire to pay would be the fear of a deficiency judgment where he has other property to protect.

Then let us inquire:

a. Can the obligee recover lawful money in lieu of the specified gold coin?

b. Can the mortgagee or the trustee in a trust deed, securing the gold clause obligation, sell for the specified gold coin, *or* lawful money; and can the trustee after such sale for lawful money convey any title where the trust instrument or mortgage provides that, only in case of default, the trustee may sell for gold coin and execute and deliver a trustee's deed after such sale and after due payment in gold is made? Is not the sale for gold coin unlawful under the Gold Reserve Act, and is not a sale for lawful money in excess of the powers of sale of trustee where he is authorized to sell for gold coin only; and is not the trustee's deed a nullity?

c. What are the rights of obligor's assignee or grantee who did not assume payment of the obligation or trust deed or mortgage, but who merely took title subject to existing liens, and who acquired title for a valuable consideration after the enactment of these acts of Congress?

ARGUMENT

I.

"If (Public Resolution No. 10) * * * be valid, then on its face it clearly relieves the debtor from compliance with the provisions of the gold clause of the bonds, and the question is solved. * * * So, it is obvious, I think, that the upholding of these so-called gold clause contracts would vastly hurt, if not destroy business and shake if not over-turn the entire financial structure of this country. It would, I repeat, bankrupt well-nigh every railroad, every municipality, every road district, or similar instrumentality of state government, and well-nigh every State in the Union. And since in the financial crash

of these debtor classes, the creditor classes, now urging the letter of their bonds, might well themselves go down in the common ruin, this situation, as already suggested, should be avoided, if it is legally possible to do so, within the constitutional limits. * * * And so it follows that Public Resolution No. 10 is in my opinion valid; that the gold clause is therefore unenforceable in the ultimate letter thereof as urged by intervenors, and is enforceable, in equity only (where the debtor offers to pay in order to secure a discharge)."

Judge Faris, *In re Mo. Pac. R. R. Co.*, 7 F. Supp. 1.

II.

Obligor May Not Do Indirectly What He is Prohibited From Doing Directly

"It can not, of course, be doubted that should payment be decreed to be made in paper money equivalent of gold, the power of the Congress in the premises will be just as effectually thwarted and nullified as if payment in gold were decreed."

In re Mo. Pac. R. R. Co., 7 Fed. Supp. 1.

III.

An Obligation Payable in Specific Coin or Currency is That and Nothing Else

"In other words, the contract does not say that if gold is no longer money when pay day comes, then payment shall be made in such money as is current; but on the basis of the amount of current money which a gold dollar will buy. I think the very terms of the contract preclude such a judgment. * * * "

Judge Faris, *In re Mo. Pac. R. R.*, supra.

An obligation payable in specific coin or currency is that and nothing else. By the admitted and settled rules of law, such a contract can be performed, according to the agreement of the parties, only by a payment of the kind of money specified. It has no "obligation" independent of that provision; and so of contracts payable in currency specifically, or in bullion or in wheat, etc.

Carpentier v. Atherton, 25 Cal. 564, 582;
Sheehy v. Chalmers, 4 Cal. Unrep. 617, 618;
Galland v. Lewis, 26 Cal. 46, 49, 50;
Tyers v. U. S., 5 Court Claims, 509;
Butler v. Horwitz, 74 U. S. (7 Wall), 258, 270, 19 L. Ed. 149, 150;
Trebilcock v. Wilson, 79 U. S. (12 Wall), 687, 700, 20 L. Ed. 461.

Contracts payable in gold or silver dollars, can only be satisfied by the payment of coined dollars, and can not be discharged by notes of the United States declared to be a legal tender in payment of debts.

Bronson v. Rodes, 7 Wall. 229, 74 U. S. XIX. 141;
Title 31, Sec. 314, U. S. C.;
Vilhac v. Biven, 28 Cal. 409, 414;
Carpentier v. Atherton, 25 Cal. 564, 582.

The designation of a specific kind of money in the contract is a material element of the contract. It failing, the entire contract falls. To substitute another medium of payment is a material modification of it in a matter of substance, to which change consent of all parties is necessary.

Belloc v. Davis, 38 Cal. 242, 258.

IV.

The Law as Part of the Contract

6 Cal. Jur., Sec. 186, p. 310, p. 313;
13 *Corpus Juris*, 560, Sec. 523, p. 561.

V.

Public Resolution No. 10 Declares All Gold Clause Contracts to be Against Public Policy; It Does Not Say That the Obligation Must Be Paid in Current Legal Tender.

The second sentence of the Resolution states that every such obligation "shall be discharged upon payment" dollar for dollar in legal tender. Nowhere does the Resolution say that the obligor must pay in current legal tender; it says merely that if he pays, the obligation "shall be discharged." It is similar to the right that a third party has to go and pay the debt of another; upon such payment the obligation shall be discharged.

House of Representatives Report No. 169, accompanying the Resolution, from the Committee on Banking and Currency, states:

> "The Resolution, accomplishes three purposes: * * * 2. It provides that obligations, public and private, expressed to be payable in gold or in a specific coin or currency, *may* be discharged dollar for dollar in legal tender. * * * In the light of this situation two phenomena * * * make the enforcement of the gold clause incompatible with the public interest * * * and that in such event, they become *invalid and unenforceable*. * * * This legislation is comple-

mentary to * * * and *essential for the accomplishment of national recovery.*"

Note the words "invalid and unenforceable."

Note the use of the word "may" in 2. *May* denotes permission; *shall* denotes authority and does not impose any sense of duty. The entire context is that he *may* pay if he desires but is not obligated to pay. As Judge Faris said, under the Parity Acts current legal tender has the same value by decree of government as gold coin, and to say that he must pay lawful money in lieu of gold would be thwarting the purpose of the act, and also adding to the obligation a condition that has not been *consented* to by the obligor.

VI.
Excuses for Non-Performance

1. Legal Prohibition.

   6 *Cal. Jur.*, 440, Sec. 263;
   Gold Reserve Act of 1934;
   Public Resolution No. 10;

   California Civil Code, Sec. 1511: "The want of performance of an obligation, or an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; * * * "

2. Destruction or non-existence of subject matter.

   6 *Cal. Jur.*, 443, Sec. 265.

The Gold Reserve Act of 1934, destroyed all United States gold coin.

There were more than 1,000 billions of dollars in gold sold, with a known mined quantity of less than 10 billions of dollars. The contract was illegal when made.

3. Impossibility of performance.

6 Cal. Jur., 439;

In re Mo. Pac. R. R. Co., 7 F. Supp. 1, citing Judge Van DeVanter (now Mr. Justice Van De Vanter) in the case of *United States v. Dietrich*, 126 Fed. 1, c. 674.

4. A contract which essentially violates public policy is illegal and void. Whether a contract against public policy be executory or executed, no action may be brought, either on the contract or to recover back the consideration.

Martin v. Wade, 37 Cal. 168;

Morey v. Paladini, 187 Cal. 727, 733, 734, 203 Pac. 760;

Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825;

Berka v. Woodward, 125 Cal. 119, 127, 57 Pac. 777;

6 *Cal. Jur.*, 109, Sec. 70, 148, Sec. 105;

13 *Corpus Juris*, 225, Sec. 27, 5; p. 424, Sec. 360, 3; 410 Sec. 339;

41 *Corpus Juris*, 439, Sec. 319;

Faxon v. All Persons, 166 Cal. 707, 719, 137 Pac. 919, 925, syl. 9.

VII.
Quieting Title

Both the mortgagor and his grantee may maintain a suit to quiet title or ejectment against a mortgagee in possession where the debt as well as the mortgage lien is against public policy or illegal or factually or legally impossible of performance.

Faxon v. All Persons, 166 Cal. 707, 719, 137 Pac. 919, 925, syl. 9.
37 *Corpus Juris*, 338, Sec. 80.

"A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

California Civil Code, 2911.

VIII.
Trusts and Powers of Trustees

"The following obligations cannot be specifically enforced: * * * 4. An agreement to perform an act which the party has not power lawfully to perform when required to do so; * * * "

California Civil Code, Sec. 3390.

"When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."

California Civil Code, Sec. 871;
25 *Cal. Jur.*, 59, 291;
39 *Cyc.*, 99.

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

California Civil Code, Sec. 2279.

When the purpose for which an express trust was created ceases, the estate of the trustee also ceases, the power to sell is terminated, and no reconveyance is required.

Southern Pac. R. R. Co. v. Doyle, 11 Fed. 253, 8 Sawy. Circuit Court, D. California; 261, 262, 263, 264;

French v. Edwards, 88 U. S. (12 Wall) 151, 22 L. Ed. 534, 535, 536, Circuit Court, California;

McNut v. Nuevo Land Co., 167 Cal. 459, 464, 140 P. 6, 9.

A conveyance which an agent has no power to make is a nullity, and the legal title remains in the principal.

1 *Cal. Jur.*, 828, Sec. 109, n. 4, 5;

Frink v. Roe, 70 Cal. 296, 303, 11 Pac. 820, 827;

Randall v. Duff, 79 Cal. 115, 118, 3 L. R. A. 754, 19 Pac. 532, 534;

Dupont v. Wertheman, 10 Cal. 354, 367, 368.

"A trustee must fulfill the purpose of the trust as declared at its creation and must follow all the directions of the trustor given at that time, except as modified by the *consent* of all parties interested in the same manner, and to the same extent as an employee."

California Civil Code 2258;

25 *Cal. Jur.*, 332;

39 *Cyc.*, 293.

To substitute lawful money instead of gold coin is an entirely different and new obligation, which requires the consent of all parties.

IX.
The Panic

Money panics are caused by the inflation or deflation of value of gold and nothing else.

> "PANIC: A sudden, unreasonable, over-powering fear, especially when affecting a large number simultaneously."
>
> *Standard Dictionary.*

> "VALUE: The desirability or worth of a thing compared with the desirability of something else."
>
> *Standard Dictionary.*

Panic and value are both mental operations. Therefore, value is not a component part of any inanimate thing, and exists only in the minds of persons.

The dollar is merely a weight of gold of certain fineness, bearing the stamp of the government as weighmaster. T. 31, Sec. 314, *U. S. C.*

The values of all commodities are controlled by the law of supply and demand.

1,000 billions of dollars in gold were sold for future delivery throughout the world, with an existing quantity of less than 10 billions of dollars. This abnormal ratio between supply and demand inflated the desirability (value) for gold.

All other commodities maintain approximately the same ratio between supply and demand and have the

same comparative value today as in the old prosperous days. In other words, your home today will exchange for just as good a home or just as much wheat, or stocks, or what have you, as in the prosperous times, varying only with the fluctuating values of each commodity under the law of supply and demand. While your home will sell today for only one-fourth as many dollars, that amount of dollars has four times their former value and will buy four times as much value, and the result is the same. Where then has any commodity been depressed in value; only gold is now inflated in value.

If you buy an article at a total cost of $600 and sell it for $1,000, do you make $400 (as your teacher taught you)? Suppose you bought for $600 on a 50-cent wheat market, or a value of 1200 bushels of wheat (or any other commodity you deal in); and suppose you sell on a $2.00 wheat market, you then receive 500 bushels of wheat value; and you have actually lost 700 bushels of wheat value, or 7/12ths of your investment. Is that a $400 profit?

If you manufacture an article for $100 on a 50-cent wheat market, or a cost of 200 bushels of wheat, can you compete with a manufacturer who tomorrow manufactures for $100 on a $2 wheat market or a cost of only 50-bushel wheat, or ¼th your cost today. Can industry start, with such a medium of exchange?

Five-dollar a day labor on a 50-cent wheat market receives 10 bushels of wheat; whereas on a prosperous $2 wheat market, $5 a day labor is worth only 2½ bushels of wheat, or ¼ as much in value.

Or you buy a government bond on a 50-cent wheat market for $100, calling for a cost of 200 bushels of wheat. When the wheat market is $2.00, the government bond will buy only 50 bushels of wheat, or a depreciation in commodity value of 75%. Is that bond the safest security in the world?

When you borrowed the money, each 80 cents bought one pound of butter; today each 80 cents paid calls for four pounds of butter. The extra pounds cause the panic.

A commodity dollar, based on the value, say of twenty staple raw commodities, instead of as now on the value of one commodity, gold, would make inflation and/or deflation of money value impossible, and would end money panics. But, is that wanted?

X.
Conclusion

In conclusion, Public Resolution No. 10 declares all gold clause obligations to be against public policy, invalid and unenforceable.

The Gold Reserve Act of 1934 makes all gold clause obligations illegal, prohibits such contracts under penalty, and destroys all United States gold coin.

Gold clause obligations are therefore legally and factually impossible of performance, and are invalid, illegal and unenforceable.

To require the obligor to pay lawful money where he has obligated himself to pay only a specific coin or currency would modify the obligation in substance and be

a new obligation that requires the obligor's express consent; and also would be unconstitutional.

The only equities the obligee can possibly claim is where the obligor offers to pay in lawful money to get a discharge and under such a condition, it is equitable he recover what the obligor must consent to pay to get the discharge.

Respectfully submitted,

George C. Johnson,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 532.—October Term, 1934.

John M. Perry, *vs.* The United States. } On Certificate from the Court of Claims.

[February 18, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The certificate from the Court of Claims shows the following facts:

Plaintiff brought suit as the owner of an obligation of the United States for $10,000, known as "Fourth Liberty Loan 4¼% Gold Bond of 1933-1938". This bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288), as amended, and Treasury Department circular No. 121 dated September 28, 1918. The bond provided: "The principal and interest hereof are payable in United States gold coin of the present standard of value".

Plaintiff alleged in his petition that at the time the bond was issued, and when he acquired it, a dollar in gold consisted of 25.8 grains of gold .9 fine"; that the bond was called for redemption on April 15, 1934, and, on May 24, 1934, was presented for payment; that plaintiff demanded its redemption "by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine"; that defendant refused to comply with that demand, and that plaintiff then demanded "258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing 15-5/21 grains of gold .9 fine, or 16,931.25 dollars in legal tender currency"; that defendant refused to redeem the bond "except by the payment of 10,000 dollars in legal tender currency"; that these refusals were based on the Joint Resolution of the Congress of June 5, 1933 (48 Stat. 113), but that this enactment was unconstitutional as it operated to deprive plaintiff of his property without due process of law; and that, by this action of defendant, he was damaged "in the sum of $16,931.25, the value of defendant's obligation", for which, with interest, plaintiff demanded judgment.

Defendant demurred upon the ground that the petition did not state a cause of action against the United States.

The Court of Claims has certified the following questions:

"1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

"2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

First. The import of the obligation. The bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. *Norman* v. *Baltimore & Ohio R. R. Co.*, decided this day. The bond now before us is an obligation of the United States. The terms of the bond are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. The Act of September 24, 1917, both in its original and amended form, authorized the moneys to be borrowed, and the bonds to be issued, "on the credit of the United States" in order to meet expenditures needed "for the national security and defense and other public purposes authorized by law". 40 Stat. 288, 503. The circular of the Treasury Department of September 28, 1918, to which the bond refers "for a statement of the further rights of the holders of bonds of said series" also provided that the principal and interest "are payable in United States gold coin of the present standard of value".

This obligation must be fairly construed. The "*present* standard of value" stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and

took its bond that he would not suffer loss through depreciation in the medium of payment.

The Government states in its brief that the total unmatured interest-bearing obligations of the United States outstanding on May 31, 1933, (which it is understood contained a "gold clause" substantially the same as that of the bond in suit) amounted to about twenty-one billions of dollars. From statements at the bar, it appears that this amount has been reduced to approximately twelve billions at the present time, and that during the intervening period the public debt of the United States has risen some seven billions (making a total of approximately twenty-eight billions five hundred millions) by the issue of some sixteen billions five hundred millions of dollars "of non-gold-clause obligations".

Second. The binding quality of the obligation. The question is necessarily presented whether the Joint Resolution of June 5, 1933 (48 Stat. 113) is a valid enactment so far as it applies to the obligations of the United States. The Resolution declared that provisions requiring "payment in gold or a particular kind of coin or currency" were "against public policy," and provided that "every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein", shall be discharged "upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts". This enactment was expressly extended to obligations of the United States and provisions for payment in gold, "contained in any law authorizing obligations to be issued by or under authority of the United States", were repealed.[1]

There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. In attempted justification of the Joint Reso-

[1]And subdivision (b) of section 1 of the Joint Resolution of June 5, 1933, provided: "As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations".

lution in relation to the outstanding bonds of the United States, the Government argues that "earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce"; and, from this premise, the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "*on the credit of the United States*", the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

The binding quality of the obligations of the Government was considered in the *Sinking-Fund* cases, 99 U. S. 700, 718, 719. The question before the Court in those cases was whether certain action was warranted by a reservation to the Congress of the right to

amend the charter of a railroad company. While the particular action was sustained under this right of amendment, the Court took occasion to state emphatically the obligatory character of the contracts of the United States. The Court said: "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen".[2]

When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States* v. *Bank of Metropolis*, 15 Pet. 377, 392, except that the United States cannot be sued without its consent. See, also, *The Floyd Acceptances*, 7 Wall. 666, 675; *Cooke* v. *United States*, 91 U. S. 389, 396. In *Lynch* v. *United States*, 292 U. S. 571, 580, with respect to an attempted abrogation by the Act of March 20, 1933 (48 Stat. 8, 11) of certain outstanding war risk insurance policies, which were contracts of the United States, the Court quoted with approval the statement in the *Sinking-Fund* cases, *supra*, and said: "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to

[2]Mr. Justice Strong, who had written the opinion of the majority of the Court in the legal tender cases (Knox *v.* Lee, 12 Wall. 457), dissented in the Sinking-Fund cases, 99 U. S. p. 731, because he thought that the action of the Congress was not consistent with the Government's engagement and hence was a transgression of legislative power. And with respect to the sanctity of the contracts of the Government, he quoted, with approval, the opinion of Mr. Hamilton in his communication to the Senate of January 20, 1795 (citing 3 Hamilton's Works, 518, 519), that "when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it."

reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation".

The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.[3] In the United States, sovereignty resides in the people who act through the organs established by the Constitution. *Chisholm* v. *Georgia*, 2 Dall. 419, 471; *Penhallow* v. *Doane's Administrators*, 3 Dall. 54, 93; *McCulloch* v. *Maryland*, 4 Wheat. 316, 404, 405; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists

[3]Oppenheim, International Law, 4th ed., vol. 1, secs. 493, 494. This is recognized in the field of international engagements. Although there may be no judicial procedure by which such contracts may be enforced in the absence of the consent of the sovereign to be sued, the engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy with respect to the performance of the engagement is conferred upon an international tribunal. Hall, International Law, 8th ed., sec. 107; Oppenheim, *loc. cit.;* Hyde, International Law, vol. 2, sec. 489.

and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. *Lynch* v. *United States, supra,* pp. 580, 582.

The Fourteenth Amendment, in its fourth section, explicitly declares: "The validity of the public debt of the United States, authorized by law, . . . shall not be questioned". While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted. Nor can we perceive any reason for not considering the expression "the *validity* of the public debt" as embracing whatever concerns the integrity of the public obligations.

We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

Third. The question of damages. In this view of the binding quality of the Government's obligations, we come to the question as to the plaintiff's right to recover damages. That is a distinct question. Because the Government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched. Plaintiff seeks judgment for $16,931.25, in present legal tender currency, on his bond for $10,000. The question is whether he has shown damage to that extent, or any actual damage, as the Court of Claims has no authority to entertain an action for nominal damages. *Grant* v. *United States,* 7 Wall. 331, 338; *Marion & Rye Railway Co.* v. *United States,* 270 U. S. 280, 282; *Nortz* v. *United States,* decided this day.

Plaintiff computes his claim for $16,931.25 by taking the weight of the gold dollar as fixed by the President's proclamation of January 31, 1934, under the Act of May 12, 1933 (48 Stat. 52, 53), as amended by the Act of January 30, 1934 (48 Stat. 342), that is, at 15-5/21 grains nine-tenths fine, as compared with the weight fixed by

the Act of March 14, 1900 (31 Stat. 45), or 25.8 grains nine-tenths fine. But the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. The question of actual loss cannot fairly be determined without considering the economic situation at the time the Government offered to pay him the $10,000, the face of his bond, in legal tender currency. The case is not the same as if gold coin had remained in circulation. That was the situation at the time of the decisions under the legal tender acts of 1862 and 1863. *Bronson* v. *Rodes,* 7 Wall. 229, 251; *Trebilcock* v. *Wilson,* 12 Wall. 687, 695; *Thompson* v. *Butler,* 95 U. S. 694, 696, 697. Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation.[4] The Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange. Acts of March 9, 1933, 48 Stat. 1; January 30, 1934, 48 Stat. 337. Such dealings could be had only for limited purposes and under license. Executive Orders of April 20, 1933, August 28, 1933, and January 15, 1934; Regulations of the Secretary of the Treasury, January 30 and 31, 1934. That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange. And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310, 311. The Court said in that case: "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use and exchange. . . . However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt that the power to coin money includes the

[4] In its Report of May 27, 1933, it was stated by the Senate Committee on Banking and Currency: "By the Emergency Banking Act and the existing Executive Orders gold is not now paid, or obtainable for payment, on obligations public or private". Sen. Rep. No. 99, 73d Cong., 1st sess.

power to prevent its outflow from the country of its origin''. The same reasoning is applicable to the imposition of restraints upon transactions in foreign exchange. We cannot say, in view of the conditions that existed, that the Congress having this power exercised it arbitrarily or capriciously. And the holder of an obligation, or bond, of the United States, payable in gold coin of the former standard, so far as the restraint upon the right to export gold coin or to engage in transactions in foreign exchange is concerned, was in no better case than the holder of gold coin itself.

In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets or for dealings in foreign exchange or for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation. Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which ''all forms of money'' of the United States were to be ''maintained at a parity'', had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.

Plaintiff demands the ''equivalent'' in currency of the gold coin promised. But ''equivalent'' cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sus-

tained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

In the view that the facts alleged by the petition fail to show a cause of action for actual damages, the first question submitted by the Court of Claims is answered in the negative. It is not necessary to answer the second question.

Question No. 1 is answered "No".

SUPREME COURT OF THE UNITED STATES.

No. 532.—October Term, 1934.

John M. Perry, *vs.* The United States. } On Certificate from the Court of Claims.

[February 18, 1935.]

Mr. Justice Stone.

I agree that the answer to the first question is "No," but I think our opinion should be confined to answering that question and that it should essay an answer to no other.

I do not doubt that the gold clause in the Government bonds, like that in the private contracts just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause, *Feist* v. *Société Intercommunale Belge d'Electricité*, [1934] A. C. 161, 170-173; *Serbian and Brazilian Bond Cases*, P. C. I. J., series A., Nos. 20-21, pp. 32-34, 109-119. In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight.

I do not understand the Government to contend that it is any the less bound by the obligation than a private individual would be, or that it is free to disregard it except in the exercise of the constitutional power "to coin money" and "regulate the value thereof." In any case, there is before us no question of default apart from the regulation by Congress of the use of gold as currency.

While the Government's refusal to make the stipulated payment is a measure taken in the exercise of that power, this does not disguise the fact that its action is to that extent a repudiation of its undertaking. As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, I cannot escape the conclusion, announced for the Court, that in the situation now presented, the Government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action. To that extent it has relieved itself

, regardless of their purchasing power or the state of our internal economy at the due date.

of the obligation of its domestic bonds, precisely as it has relieved the obligors of private bonds in No. 270, *Norman* v. *Baltimore & Ohio R. R. Co.*, decided this day.

In this posture of the case it is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in the bonds of private individuals, or that in some situation not described, and in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency. I am not persuaded that we should needlessly intimate any opinion which implies that the obligation may so operate, for example, as to interpose a serious obstacle to the adoption of measures for stabilization of the dollar, should Congress think it wise to accomplish that purpose by resumption of gold payments, in dollars of the present or any other gold content less than that specified in the gold clause, and by the re-establishment of a free market for gold and its free exportation.

There is no occasion now to resolve doubts, which I entertain, with respect to these questions. At present they are academic. Concededly they may be transferred wholly to the realm of speculation by the exercise of the undoubted power of the Government to withdraw the privilege of suit upon its gold clause obligations. We have just held that the Court of Claims was without power to entertain the suit in No. 531, *Nortz* v. *United States*, because, regardless of the nature of the obligation of the gold certificates, there was no damage. Here it is declared that there is no damage because Congress, by the exercise of its power to regulate the currency, has made it impossible for the plaintiff to enjoy the benefits of gold payments promised by the Government. It would seem that this would suffice to dispose of the present case, without attempting to prejudge the rights of other bondholders and of the Government under other conditions which may never occur. It will not benefit this plaintiff, to whom we deny any remedy, to be assured that he has an inviolable right to performance of the gold clause.

Moreover, if the gold clause be viewed as a gold value contract, as it is in *Norman* v. *Baltimore & Ohio R. R. Co., supra*, it is to be noted that the Government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause

obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery. In that case it would seem to be implicit in our decision that the prohibition, at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money.

I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds.